IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

CASE NO. 78-5403

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SUPREME COURT, U.S.

VINCENT ANTHONY BUSH,

PETITIONER,

V.

STATE OF FLORIDA,

RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL, FIRST DISTRICT OF FLORIDA

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

CASE NO. ____

VINCENT ANTHONY BUSH,

PETITIONER,

V.

STATE OF FLORIDA,

RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL, FIRST DISTRICT, STATE OF FLORIDA

Petitioner moves that the Court grant a writ of certiorari to review the judgment of the District Court of Appeal, First District of Florida, dated February 27, 1978, and reported in 355 So.2d 488. A copy of this decision is included in the record submitted in support of this petition at pages 1 and 2.

Other documents in the record will be designated in this petition by the abbreviation "R" followed by the appropriate page number.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. Section 1257(3). The grounds for asserting jurisdiction are that the petitioner was convicted and sentenced for the offense of robbery by the State of Florida on the

basis of evidence derived, in part, from an illegal seizure of his person in violation of the Fourth Amendment to the United States Constitution made applicable to the stafes by the Fourteenth Amendment. Mapp v. Ohio, 367 U.S. 643, 6 L.Ed.2d 1081 (1961).

The judgment of the District Court of Appeal sought to be reviewed was entered on February 27, 1978. A timely notice of certiorari was filed in the Florida Supreme Court on March 23, 1978 (R-3). Certiorari was denied on jurisdictional grounds by the Florida Supreme Court June 30, 1978 (R-4).

QUESTION PRESENTED

WHETHER THE FOURTH AMENDMENT PERMITS LAW ENFORCEMENT OFFICERS TO ARREST SUSPECTS IN THEIR HOMES WHEN NO WARRANT HAS BEEN OBTAINED AND THERE ARE NO EXIGENT CIRCUMSTANCES DEMONSTRATED EXCUSING THE ABSENCE OF AN ARREST WARRANT.

CONSTITUTIONAL PROVISIONS INVOLVED

The constitutional provision involved in this case is the Fourth Amendment to the United States Constitution, made applicable to the states through the Fourteenth, which provides:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

STATEMENT OF THE CASE

The petitioner was charged with robbery in the Circuit Court of Duval County, Florida (R-5). Prior to trial a

motion and an amended motion were filed seeking to suppress a written statement given by petitioner to law enforcement officers (R-6-8). The amended motion alleged in part as follows:

> "[A]nd for grounds for said Motion would show that the Defendant was arrested on January 11th, 1977, without a warrant at approximately 9:30 O'Clock A.M., that morning. That he was asleep in his home when officers entered and on being awakened, there were two (2) officers of the Jacksonville Sheriff's Office with guns pointed directly at his head at a distance of less than two yards. That he was taken from his home to the Duval County Jail by these and other officers and at 1:20 O'Clock P.M., that afternoon, signed a statement which was written for him by one of the officers who had been questioning him.
>
> 1. The statement was illegally obtained without a warrant.
>
> 2. There was no probable cause for his arrest.
>
> 3. The officers should have taken him to a magistrate or other judicial officer.
>
> 4. There was no crime committed in the presence of the officers nor did they have probable cause to believe that the Defendant had committed a crime.
>
> 5. Said arrest and written statement was unlawful, void and in violation of Defendant's constitutional and legal rights." (R-7,8).

At the hearing on the motion to suppress Deputy J.W. Terry testified that he was told by Detective Kearney that the petitioner had been involved in the Heart of Jacksonville Hotel robbery (R-13). Kearney's information had come from another participant in the robbery, Johnny Winters (R-33-38). At approximately 10:30 a.m. on January 11, 1977, Detectives Terry, Kearney, and Bradley went to the petitioner's house to arrest him. They knocked on the door, were admitted to the

home, and found the petitioner asleep on a sofa. At a distance of approximately three feet from petitioner, the officers drew their guns, pointed them at petitioner and arrested him. Petitioner was taken immediately to the Sheriff's Office and gave the incriminating statement sought to be suppressed.

The officers making the arrest did not have a warrant and had not attempted to obtain one. When asked why an arrest warrant had not been sought Detective Terry said:

> "I don't know, Mr. Reese. It's like I stated before, I had just received this information possibly a day or so before and due to the lack of leads that I had at the time working the robbery, I had suspended the case and at this time due to the information that had been received by Detective Kearney and Bradley, they reopened the case and I don't know why they did not request a warrant. I don't know that they didn't." (R-34).

The petitioner testified that he had been at home asleep when the officers woke him. Their guns were pointed at him. Petitioner was told he was under arrest for robbery and murder.

One of the grounds asserted by petitioner's counsel in support of the motion to suppress was that the officers

> "Had a chance to get a -- to go before a Court and get a warrant which they did not do. . . ." (R-40).

The trial judge denied the motion to suppress and the statement was ruled admissible (R-53,55).

The petitioner was convicted and sentenced (R-56).

In the District Court of Appeal the petitioner presented the Fourth Amendment issue as follows:

> "WHETHER THE TRIAL JUDGE SHOULD HAVE SUPPRESSED THE APPELLANT'S [PETITIONER'S] CONFESSION BECAUSE

> IT WAS THE RESULT OF AN ARREST OF THE APPELLANT [PETITIONER] IN HIS HOME WITHOUT A WARRANT AND WITH NO SHOWING BY THE STATE OF EXIGENT CIRCUMSTANCES THAT WOULD HAVE EXCUSED THE ABSENCE OF AN ARREST WARRANT" (R-57).

In support of this point it was argued that petitioner's confession had been made within two hours of his arrest and was the direct result of unconstitutional custody; the warrantless arrest of the petitioner in his home was claimed to have violated his right to be secure in his person and in his home against unreasonable seizures as guaranteed by both the Fourth Amendment to the United States Constitution and by Art. I, § 12 of the Florida Constitution. It was also urged that the taint of the illegal custody had not been dissipated by any intervening cause, since the giving of warnings prescribed by Miranda v. Arizona, 384 U.S. 436, 16 L.Ed.2d 694 (1966), do not automatically break the chain of illegal custody. Brown v. Illinois, 422 U.S. 590, 45 L.Ed.2d 416 (1975); Davis v. Mississippi, 394 U.S. 721, 22 L.Ed.2d 676 (1969).

In the District Court brief petitioner recognized that the Florida Supreme Court had refused to anticipate a ruling by this Court that warrantless arrests in the home might violate privacy interests protected by the Fourth Amendment and had therefore held that a warrantless arrest of a suspect in his home was lawful under § 901.15(3), Fla. Stat. (1975), in State v. Perez, 277 So.2d 778 (Fla. 1973), cert. den. 414 U.S. 1064.

Despite Perez, petitioner argued that the Fourth Amendment ultimately would be interpreted as prohibiting warrantless arrests of a suspect who was within the protected area of the privacy of his home in the absence of a showing of exigent circumstances to justify a warrantless arrest. Petitioner relied upon the decisions of this Court which had construed the Fourth Amendment to hold that the

Warrant Clause requires obtaining of a search warrant for premises even though probable cause unquestionably exists. Agnello v. United States, 269 U.S. 20, 70 L.Ed. 145 (1925); Johnson v. United States, 333 U.S. 10, 92 L.Ed. 436 (1948); Jones v. United States, 357 U.S. 493, 2 L.Ed.2d 1514 (1958).

Petitioner also relied upon the trend of decisions protecting privacy interests with the Warrant Clause when there was a reasonable expectation of privacy, especially in the home. Katz v. United States, 389 U.S. 347, 19 L.Ed.2d 576 (1967); Vale v. Louisiana, 399 U.S. 30, 26 L.Ed.2d 409 (1970); Stanley v. Georgia, 394 U.S. 557, 22 L.Ed.2d 542 (1969); see, Coolidge v. New Hampshire, 403 U.S. 443, 29 L.Ed.2d 564 (1971); United States v. Chadwick, 53 U.S. 538, 53 L.Ed.2d 538 (1977); United States v. United States District Court, 407 U.S. 297, 32 L.Ed.2d 752 (1972).

Petitioner also argued that the validity of warrantless arrests in the home had been reserved in prior decisions but that when the Court would decide that issue it would be resolved in favor of the citizen rather than the state. Jones v. United States, supra, 357 U.S. 493, 2 L.Ed.2d 1514; Coolidge v. New Hampshire, supra, 403 U.S. 443, 29 L.Ed.2d 564; Gerstein v. Pugh, 420 U.S. 103, 43 L.Ed.2d 54 (1975); United States v. Watson, 423 U.S. 411, 46 L.Ed.2d 598 (1976); United States v. Santana, 427 U.S. 38, 49 L.Ed.2d 300 (1976).

The resolution of this issue by the District Court of Appeal was based on the Florida Supreme Court decision in State v. Perez, supra, 277 So.2d 778, which held that as a matter of state law a warrantless arrest in the home was valid even without a showing of exigent circumstances. (Petitioner's brief on this point in the First District Court of Appeal is made a part of the record accompanying this petition at pages 57 through 81).

The Florida Supreme Court refused to consider petitioner's request for certiorari review, finding that it lacked jurisdiction (R-4). The cause is here to review the decision of the First District Court, finding that it was not necessary to either obtain a warrant or demonstrate exigent circumstances for the arrest of petitioner in his home.

REASONS FOR GRANTING THE WRIT

THE ISSUE OF WARRANTLESS ARRESTS WITHOUT EXIGENT CIRCUMSTANCES IN NON-PUBLIC PLACES HAS BEEN EXPRESSLY RESERVED BY THIS COURT AND HAS GENERATED CONSIDERABLE CONFUSION AMONG STATE AND FEDERAL COURTS. PETITIONER'S CASE PRESENTS THIS VITAL FOURTH AMENDMENT QUESTION IN A STRAIGHT-FORWARD MANNER CAPABLE OF DECISIVE RESOLUTION.

The facts of the petitioner's arrest are virtually uncontradicted. The officers had talked with an alleged perpetrator of the crime who confessed his involvement and implicated the petitioner. This information was learned by the officers at least one day prior to the arrest. No effort was made to obtain an arrest warrant. The officers went to the petitioner's home where several persons were present, they entered the home after identifying themselves, they found the petitioner asleep on a sofa, they woke him with guns drawn, and then placed him under arrest.

The petitioner's counsel challenged the admissibility of the statement obtained two hours after the arrest by appropriate pre-trial motion and by argument at the hearing. The State offered no evidence that a warrant had been obtained and no justification for the failure to seek a warrant.

Petitioner contends that his confession, made within two hours of his arrest, was the direct result of unconstitutional custody and the trial judge erred in failing to

suppress it. Brown v. Illinois, supra, 422 U.S. 590, 45 L.Ed.2d 416. The custody was unconstitutional because the warrantless arrest of the petitioner in his home violated his right to be secure in his person and in his home against unreasonable seizures as guaranteed by the Fourth Amendment to the United States Constitution made applicable to the states by the Fourteenth. Mapp v. Ohio, 367 U.S. 643, 6 L.Ed.2d 1081 (1961).

The issue is whether a warrantless arrest in the home violates privacy interests protected by the prohibition against unreasonable searches and seizures. There has never been a resolution of that issue by this Court. The Florida Supreme Court has held that a warrantless arrest of a suspect in his home is lawful pursuant to § 901.15(3), Fla. Stat. (1975). State v. Perez, 277 So.2d 778 (Fla. 1973), cert. den. 414 U.S. 1064.

This Court has construed the Fourth Amendment to mean that the Warrant Clause requires a search warrant prior to law enforcement agents searching premises even though probable cause unquestionably exists. Agnello v. United States, 269 U.S. 20, 70 L.Ed. 145 (1925); Johnson v. United States, 333 U.S. 10, 92 L.Ed. 436 (1948); Jones v. United States, 357 U.S. 493, 2 L.Ed.2d 1514 (1958). Exceptions to the requirement of a warrant for searching premises are limited to "only a few specifically established and well-delineated exceptions". Katz v. United States, 389 U.S. 347, 357, 19 L.Ed.2d 576, 585 (1967).

Petitioner here presents the question whether a warrant should likewise be required, or an exigency demonstrated, when a person is arrested in his home. This issue was mentioned, but not decided, in Jones v. United States, supra, 357 U.S. 493, 499, 500, 2 L.Ed.2d 1514, 1519, when the Court responded to the govern-

ment's argument that federal officers had the right to arrest a suspect upon probable cause in his home without a warrant and said:

> "These contentions, if open to the Government here, would confront us with a grave constitutional question, namely, whether the forceful nighttime entry into a dwelling to arrest a person reasonably believed within, upon probable cause that he had committed a felony, under circumstances where no reason appears why an arrest warrant could not have been sought, is consistent with the Fourth Amendment. But we do not consider this issue fairly presented by this case, for the record fails to support the theory now advanced by the Government." (Emphasis added).

This same issue was again addressed, but not decided, in a portion of the majority opinion in Coolidge v. New Hampshire, 403 U.S. 443, 29 L.Ed.2d 564 (1971). Justice Stewart noted in Coolidge that it had been argued in dissent that police have the right to arrest upon probable cause without a warrant and without demonstrating exigent circumstances and said:

> "If we were to agree with Mr. Justice White that the police may, whenever they have probable cause, make a warrantless entry for the purpose of making an arrest, and that seizures and searches of automobiles are likewise per se reasonable given probable cause, then by the same logic *any* search or seizure could be carried out without a warrant, and we would simply have read the Fourth Amendment out of the Constitution. Indeed, if Mr. Justice White is correct that it has generally been assumed that the Fourth Amendment is not violated by the warrantless entry of a man's house for purposes of arrest, it might be wise to re-examine the assumption.
>
> * * *
>
> None of the cases cited by Mr. Justice White disposes of this 'grave constitutional question.' The case of Warden v Hayden, supra,

where the Court elaborated a 'hot pursuit' justification for the police entry into the defendant's house without a warrant for his arrest, certainly stands by negative implication for the proposition that an arrest warrant is required in the absence of exigent circumstances. See also Davis v Mississippi, 394 US 721, 728, 22 L Ed 2d 676, 681, 89 S Ct 1394; Wong Sun v United States, 371 US, at 481-482, 9 L Ed 2d, at 451." (Emphasis added) 403 U.S. at 480, 481, 29 L.Ed.2d at 591.

This Court again took up the issue of warrantless arrests in Gerstein v. Pugh, 420 U.S. 103, 43 L.Ed.2d 54 (1975), stating:

"Maximum protection of individual rights could be assured by requiring a magistrate's review of the factual justification prior to any arrest, but such a requirement would constitute an intolerable handicap for legitimate law enforcement. Thus, while the Court has expressed a preference for the use of arrest warrants when feasible, Beck v Ohio, supra, at 96, 13 L Ed 2d 142; Wong Sun v United States, 371 US 471, 479-482, 9 L Ed 2d 441, 83 S Ct 407 (1963), it has never invalidated an arrest supported by probable cause solely because the officers failed to secure a warrant." 420 U.S. at 113, 43 L.Ed.2d at 64, 65.

In a footnote to that passage, however, the Court distinguished the general question of warrantless arrests from the more specific issue present here of a warrantless arrest in the home and said:

"The issue of warrantless arrest that has generated the most controversy, and which remains unsettled, is whether and under what circumstances an officer may enter a suspect's home to make a warrantless arrest." Gerstein v. Pugh, supra, 420 U.S. at 113, 43 L.Ed.2d at 65, fn. 13.

In United States v. Watson, 423 U.S. 411, 46 L.Ed.2d 598 (1976), five members of the Court held that a warrantless arrest was permissible, without exception, when the

arrest occurred in a public place. The limited scope of the holding in Watson is emphasized by this comment in the majority opinion:

"In the case before us the Court of Appeals relied heavily, but mistakenly, on Coolidge v New Hampshire, 403 US 443, 480-481, 29 L Ed 2d 564, 91 S Ct 2022 (1971), for as we noted in Gerstein v Pugh, 420 US, at 113 n 13, 43 L Ed 2d 54, 95 S Ct 854, the still unsettled question posed in that part of the Coolidge opinion was 'whether and under what circumstances an officer may enter a suspect's home to make a warrantless arrest.' Watson's midday public arrest does not present that question." (Emphasis added) 423 U.S. at 418, 46 L.Ed.2d at 605.

Although concurring in the majority opinion, Justice Powell took care to comment on what was not included in the decision, saying:

"[W]e do not today consider or decide whether or under what circumstances an officer lawfully may make a warrantless arrest in a private home or other place where the person has a reasonable expectation of privacy." 423 U.S. at 432, 433, 46 L.Ed.2d at 614.

Justice Stewart noted in a concurring opinion that since the arrest in Watson was made with probable cause "in a public place in broad daylight" the Court did not decide "whether or under what circumstances an officer must obtain a warrant before he may lawfully enter a private place to effect an arrest." 423 U.S. at 433, 46 L.Ed.2d at 614.

Justices Marshall and Brennan dissented and Justice Stevens did not participate.

The most recent pronouncement by this Court on this issue again left open the question whether a warrant is required to make an arrest of a suspect at home in the absence of exigent circumstances. United States v. Santana, 427 U.S. 38, 49 L.Ed.2d 300 (1976). Seven justices joined

in the opinion holding that a warrant was not necessary under the facts presented. Again the Court reserved the question of a warrantless arrest of a suspect in his home saying:

> "While it may be true that under the common law of property the threshold of one's dwelling is 'private,' as is the yard surrounding the house, it is nonetheless clear that under the cases interpreting the Fourth Amendment Santana was in a 'public' place. She was not in an area where she had any expectation of privacy. 'What a person knowingly exposes to the public, even in his own house or office, is not a subject of Fourth Amendment protection.' Katz v United States 389 US 347, 351, 19 L Ed 2d 576, 88 S Ct 507 (1967). She was not merely visible to the public but was as exposed to public view, speech, hearing, and touch as if she had been standing completely outside her house. Hester v United States, 265 US 57, 59, 68 L Ed 898, 44 S Ct 445 (1924). Thus, when the police, who concededly had probable cause to do so, sought to arrest her, they merely intended to perform a function which we have approved in Watson." (Emphasis added) 427 U.S. at 42, 49 L.Ed.2d at 305.

There were concurring and dissenting opinions, emphasizing the still undecided status of warrantless arrests made in the home. Justice Stewart joined the concurring opinion of Justice Stevens, who pointed out that the arrest was justified because of either exigent circumstances or harmless error. Significant was the appearance of Ms. Santana in the doorway of her home, an area not considered within the ambit of reasonable expectation of privacy. United States v. Santana, supra, 427 U.S. at 44, 45, 49 L.Ed.2d at 306 (Stevens, J., concurring).

Justice Brennan joined Justice Marshall's dissent, reiterating the protest to the Court's earlier blanket acceptance of warrantless arrests in public places announced in Watson. United States v. Santana, supra, 427

U.S. at 45-49, 49 L.Ed.2d at 306-309 (Marshall, J., dissenting).

Therefore, it appears that the Court has not reached a majority decision on the right of police to make a warrantless arrest of a suspect in his home absent a showing of exigent circumstances. Of the five justices who concurred in the majority opinion in Watson, only Justice White has consistently maintained a position allowing all arrests to be warrantless. Chimel v. California, 395 U.S. 752, 770-783, 23 L.Ed.2d 685, 698-706 (1969) (White, J., dissenting); Coolidge v. New Hampshire, supra, 403 U.S. at 511-512, fn.1,29 L.Ed.2d at 609-610. (White, J., concurring and dissenting). Justices Marshall and Brennan (as noted in dissents registered in Watson and Santana) have consistently taken the contrary position. Justice Stewart has expressed serious doubts about the validity of warrantless arrests in the home, Coolidge v. New Hampshire, supra, 403 U.S. at 480-481, 29 L.Ed.2d at 591, and made clear that the issue was not before the Court in either Watson or Santana. Justice Stevens announced a position of neutrality on this point in Santana (and took no part in Watson). Justice Powell has likewise taken care to note specifically that the issue was not being decided by Watson. Justices Blackmun, Rehnquist, and the Chief Justice joined the majority opinions in both Watson and Santana, in which the question was reserved, but have not otherwise expressed a preference.

It seems unquestioned, therefore, that eventually this Court will have to decide if the Warrant Clause applies to arrests in the home. Petitioner submits that this case presents the opportunity to make that choice.

By the momentum of prior decisions, and out of respect for the legitimate privacy interests of the

citizenry, this Court should require police to obtain warrants when making arrests in a home, absent exigent circumstances. The Warrant Clause should apply in the same fashion as if it were to be a search of other protected areas of privacy. Compare, e.g., Katz v. United States, 389 U.S. 347, 19 L.Ed.2d 576 (1967)(warrant required to intercept private telephone conversations made from a telephone booth); United States v. United States District Court, 407 U.S. 297, 32 L.Ed.2d 752 (1972)(warrant required for electronic surveillance of conversations even though the purpose was "national security"); Vale v. Louisiana, 399 U.S. 30, 26 L.Ed.2d 409 (1970)(warrant required for search of home); Coolidge v. New Hampshire, supra, 403 U.S. 443, 29 L.Ed.2d 564 (warrant required to search car on private property); United States v. Chadwick, 433 U.S. 1 , 53 L.Ed.2d 538 (1977)(warrant required to search double locked footlocker seized at time of valid warrantless arrest); Marshall v. Barlow's Inc., ___ U.S. ___, 56 L.Ed.2d 305 (1978)(warrant required to search business premises for safety hazzards notwithstanding act of Congress authorizing warrantless searches); Michigan v. Tyler, ___ U.S. ___, 56 L.Ed.2d 486 (1978)(warrant required to reenter and search arson scene after original phases of investigation terminated); Mincey v. Arizona, ___ U.S. ___, no. 77-5353 (June 21, 1978)(rejecting an automatic exigency based on an asserted "murder scene exception" to the warrant requirement); c.f., Stanley v. Georgia, 394 U.S. 557, 22 L.Ed.2d 542 (1969)(the State has no power to seize obscene material from the privacy of the home); with, e.g., Carroll v. United States, 267 U.S. 132, 69 L.Ed.2d 543 (1925)(warrant not required to seize contraband from moving vehicle); Chambers v. Maroney, 399 U.S. 42, 26 L.Ed.2d 419 (1970)(warrant not required to search vehicle at police

station after its seizure on the highway, a decision which did not obviate the necessity for a warrant to search the more privately held possession of a footlocker seized under similar circumstances in Chadwick); Cardwell v. Lewis, 417 U.S. 583, 41 L.Ed.2d 325 (1974)(warrant not required to search exterior of car parked on public property).

It is evident from this comparison that as the expectation of privacy increases, there is a corresponding increase in the need to apply the Warrant Clause as an adjunct to probable cause by requiring advance judicial permission for the intrusion.

Moreover, the explicit language of the Court in prior decisions evinces a recognizable tendency to offer greater protection from police interference to persons in their homes and other private areas (as opposed to more public places) by the insulation of the Warrant Clause.

For example, in Agnello v. United States, 269 U.S. 20, 33, 70 L.Ed. 145 (1925), the Court said:

> "Belief, however well founded, that an article sought is concealed in a dwelling house, furnishes no justification for a search of that place without a warrant. And such searches are held unlawful notwithstanding facts unquestionably showing probable cause."

In Cooper v. California, 386 U.S. 58, 59, 17 L.Ed.2d 730, 731 (1967), the Court said:

> "Searches of cars that are constantly movable may make the search of a car without a warrant a reasonable one although the result might be the opposite in the search of a home, a store, or other fixed piece of property."

In United States v. United States District Court, supra, 407 U.S. 297, 32 L.Ed.2d 752, the Court stressed the importance of the Warrant Clause in these terms:

"Though the Fourth Amendment speaks broadly of 'unreasonable searches and seizures,' the definition of 'reasonableness' turns, at least in part, on the more specific commands of the warrant clause. Some have argued that '[t]he relevant test is not whether it is reasonable to procure a search warrant, but whether the search was reasonable,' United States v Rabinowitz, 399 US 56, 66, 94 L Ed 653, 660, 70 S Ct 430 (1950). This view, however, overlooks the second clause of the Amendment. The warrant clause of the Fourth Amendment is not dead language. Rather, it has been 'a valued part of our constitutional law for decades, and it has determined the result in scores and scores of cases in courts all over this country. It is not an inconvenience to be somehow "weighed" against the claims of police efficiency. It is, or should be, an important working part of our machinery of government, operating as a matter of course to check the "well-intentioned but mistakenly overzealous executive officers" who are a part of any system of law enforcement.'" (Emphasis added) Id. at 765. (Footnote omitted).

* * *

"The Fourth Amendment does not contemplate the executive officers of Government as neutral and disinterested magistrates. Their duty and responsibility is to enforce the laws, to investigate, and to prosecute. Katz v United States, supra, at 359-360, 19 L Ed 2d at 586, 587 (Douglas, J., concurring). But those charged with this investigative and prosecutorial duty should not be the sole judges of when to utilize constitutionally sensitive means in pursuing their tasks. The historical judgment, which the Fourth Amendment accepts, is that unreviewed executive discretion may yield too readily to pressures to obtain incriminating evidence and overlook potential invasions of privacy and protected speech." (Emphasis added) (Footnotes omitted) Id. at 766.

* * *

"It is true that there have been some exceptions to the warrant requirement. Chimel v California, 395 US 752, 23 L Ed 2d 685, 89 S Ct 2034 (1969); Terry v Ohio, 392 US 1, 20 L Ed 2d 889, 88 S Ct 1868 (1968); McDonald v United States, 335 US 451, 93 L Ed 153, 69 S Ct 191 (1948); Carroll v United States, 267 US 132, 69 L Ed 543, 45 S Ct 280, 39 ALR 790 (1925). But those exceptions are few in number and carefully delineated, Katz, supra, at 357, 19 L Ed 2d at 585; in general, they serve the legitimate needs of law enforcement officers to protect their own well-being and preserve evidence from destruction. Even while carving out those exceptions, the Court has reaffirmed the principle that the 'police must, whenever practicable, obtain advance judicial approval of searches and seizures through the warrant procedure,' Terry v Ohio, supra, at 20, 20 L Ed 2d at 905; Chimel v. California, supra, at 762, 23 L Ed 2d at 693." (Emphasis added) Id. at 767.

In Cardwell v. Lewis, supra, 417 U.S. 583, 41 L.Ed.2d 325, the Court again noted the priority of privacy as a key to the warrant requirement, saying:

"Rather than property rights, the primary object of the Fourth Amendment was determined to be the protection of privacy. Id., at 305-306, 65 L Ed 647. And it had been said earlier, 'The decisions of this Court have time and again underscored the essential purpose of the Fourth Amendment to shield the citizen from unwarranted intrusions into his privacy.'" Id. at 334.

* * *

"At least since Carroll v United States, 267 US 132, 69 L Ed 543, 45 S Ct 280, 39 ALR 790 (1925), the Court has recognized a distinction between the warrantless search and seizure of automobiles or other movable vehicles, on the one hand, and the search of a home or office, on the other. Generally, less stringent warrant requirements have been applied to vehicles." Id. at 334.

* * *

"There is still another distin-

guishing factor. 'The search of an automobile is far less intrusive on the rights protected by the Fourth Amendment than the search of one's person or of a building.' Almeida-Sanchez v United States, 413 US 266, 279, 37 L Ed 2d 596, 93 S Ct 2535 (1973)(Powell, J., concurring). One has a lesser expectation of privacy in a motor vehicle because its function is transportation and it seldom serves as one's residence or as the repository of personal effects." Id. at 335 (Emphasis added).

In South Dakota v. Opperman, 428 U.S. 364, 367, 368, 49 L.Ed.2d 1000, 1004 (1976), the Court said:

"This Court has traditionally drawn a distinction between automobiles and homes or offices in relation to the Fourth Amendment. Although automobiles are 'effects' and thus within the reach of the Fourth Amendment, Cady v Dombrowski, 413 US 433, 439, 37 L Ed 2d 706, 93 S Ct 2523 (1973), warrantless examinations of automobiles have been upheld in circumstances in which a search of a home or office would not.

* * *

Besides the element of mobility, less rigorous warrant requirements govern because the expectation of privacy with respect to one's automobile is significantly less than that relating to one's home or office." (Footnotes omitted).

Therefore, although the point has not been explicitly decided by the Court, petitioner contends that he was protected by the Fourth Amendment from being arrested in his home by police who failed to obtain a warrant or explain why they did not. "Physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed. . . ." United States v. United States District Court, supra, 407 U.S. at 313, 32 L.Ed.2d at 764. The twin concepts stressed in Katz v. United States, supra, 389 U.S. 349, 19 L.Ed.2d 576, that the Amendment protects people not places and that it applies when there is a

reasonable expectation of privacy, coalesce to shield petitioner from the unilateral action taken by the police here.

A better example of abuse could hardly be imagined as the officers here, acting only on hearsay from an accomplice, invaded a private dwelling, awakened the sleeping petitioner with drawn guns, and spirited him away for questioning without bothering first to seek the authority and neutral judgment of a magistrate. This bypassing of the judiciary when making such a substantial assault on the privacy of a person in his home is intolerable, and should be found to violate the right to be free from unreasonable searches and seizures.

To underscore the need for a warrant here, it is significant that after the arrest the police first brought the petitioner to the Sheriff's Office for questioning, rather than bringing him directly to a magistrate for the determination of probable cause and the advisement of rights. This action undercuts the assumption made in Chimel v. California, supra, 395 U.S. 752, 23 L.Ed.2d 685, by Mr. Justice White in arguing that warrants were unnecessary when he said that a warrantless arrest "demands the prompt bringing of the person arrested before a judicial officer, where the existence of probable cause is to be inquired into" and that the arrested person would be provided "almost immediately with a lawyer and a judge". Id. at 782, 783, 23 L.Ed.2d at 705, 706.

Furthermore, the absence of prior judicial approval for the arrest here casts serious doubt on whether the police really had probable cause. The only evidence against petitioner at trial was his own confession. The supposed "informer" took the Fifth Amendment at trial (R-54).

Under these circumstances it is virtually impossible to assess after the fact the actual information, and the indicia of its reliability, known by the police prior to petitioner's arrest and confession. The floundering testimony of Officer Terry in explaining the facts known by him and other officers highlights the need for judicial determination of probable cause before, and not after, the arrest. In Beck v. Ohio, 379 U.S. 89, 96, 13 L.Ed.2d 142, 147 (1964), the Court commented on this same point, saying:

> "An arrest without a warrant bypasses the safeguards provided by an objective predetermination of probable cause, and substitutes instead the far less reliable procedure of an after-the-event justification for the arrest or search, too likely to be subtly influenced by the familiar shortcomings of hindsight judgment."

Because the police in the case now before the Court failed to obtain prior judicial approval before arresting petitioner in his home, when there was no showing of an excuse for not obtaining an arrest warrant, the arrest was invalid under the Fourth Amendment. Petitioner's confession was the direct result of this unconstitutional arrest and should have been suppressed.

Finally, petitioner urges this Court to accept jurisdiction because of the importance of the issue and the need for its authoritative resolution. Several circuit court of appeals' opinions have favored the rule that warrants should be required for arrests in non-public areas. E.g., United States v. Reed, 572 Fed.2d 412 (2d Cir. 1978); United States v. Killebrew, 560 Fed.2d 729 (6th Cir. 1977); Dorman v. United States, 435 Fed.2d 385 (D.C. Cir. 1970) (en banc). The New York Court of Appeals recently has taken a contrary position, thus engendering conflict between the state and federal courts within the jurisdiction of the Second Circuit. People v. Payton, ____ NE2d ____,

N.Y. Ct. Appeals, case no. 259, July 11, 1978, 23 Cr. L. Rp. 2419. The Florida Supreme Court's decision in State v. Perez, supra, places this State's rule at odds with that being followed in some federal courts. With the passage of time other jurisdictions will have to decide the question, anticipating the inevitable ruling by this Court. Those jurisdictions not aligning themselves with the side ultimately to prevail will be affected adversely by adoption of a rule which overthrows theirs. Assuming that the rule adopted requires a warrant, reasonable arguments for retroactivity could be made, since the holding should certainly have been anticipated. Cf., Stovall v. Denno, 388 U.S. 293, 18 L.Ed.2d 1199 (1967). Some convictions might be lost because of the passage of time. To avoid the attendant detrimental consequences of uncertainty, this Court should take jurisdiction here to answer the question which has so often been reserved; whether a warrant is constitutionally required for the arrest of a suspect in his home, absent exigent circumstances.

Respectfully submitted,

MICHAEL J. MINERVA
Public Defender
Second Judicial Circuit
P.O. Box 671
Tallahassee, FL 32302

Counsel for Petitioner

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

CASE NO. 78-5403

RECEIVED
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SUPREME COURT, U.S

VINCENT ANTHONY BUSH,

PETITIONER,

V.

STATE OF FLORIDA,

RESPONDENT.

RECORD IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

FROM THE DISTRICT COURT OF APPEAL
FIRST DISTRICT OF FLORIDA

MICHAEL J. MINERVA
PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT
P.O. BOX 671
TALLAHASSEE, FL 32302
COUNSEL FOR PETITIONER

RAYMOND L. MARKY
ASSISTANT ATTORNEY GENERAL
ROOM 1500
THE CAPITOL
TALLAHASSEE, FL 32304
COUNSEL FOR RESPONDENT

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FIRST DISTRICT, STATE OF FLORIDA

JANUARY TERM, A. D. 1978

VINCENT ANTHONY BUSCH,

Appellant,

vs.

STATE OF FLORIDA,

Appellee.

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING PETITION AND DISPOSITION THEREOF IF FILED.

CASE NO. GG-445

Opinion filed February 27, 1978.

An Appeal from the Circuit Court of Duval County.
Dorothy H. Pate, Judge.

Michael J. Minerva, Public Defender, for Appellant.

Robert L. Shevin, Attorney General; and Raymond L. Marky, Assistant Attorney General, for Appellee.

McCORD, Chief Judge.

Appellant contends first that the trial judge should have suppressed his confession because it was the result of an arrest of appellant in his home without a warrant and with no showing by the state of exigent circumstances that would have excused the absence of an arrest warrant. The trial court was correct in denying appellant's motion to suppress. See State v. Perez, 277 So.2d 778 (Fla. 1973). Appellant next contends that the trial court erred by instructing the jury that he could be found guilty of robbery committed while carrying a firearm when the evidence conclusively established that the firearm was in the possession of appellant's accomplice and that the judgment and sentence for armed robbery are, therefore, not supported by the

evidence. Appellant cites Earnest v. State, ____ So.2d ____, Fla. Supreme Court Case No. 51,491, opinion filed August 31, 1977, rehearing denied December 6, 1977. There, the Supreme Court construed §775.087(2), Florida Statutes (1975), which provides that any person who is convicted of robbery and who had in his possession a firearm shall be sentenced to a minimum term of imprisonment of three years. The court held that the three-year minimum term under the statute applied only to physical possession of a firearm by a defendant rather than constructive possession. Here, as in Earnest, the appellant, who did not have a firearm, was convicted as an aider and abettor of the crime in which he participated--robbery in which the offender carried a firearm or other deadly weapon [§812.13(1) and (2)(a), Florida Statutes (1975)], rather than robbery in which the offender carried no firearm, deadly weapon, or other weapon [§812.13(1) and (2)(c), Florida Statutes (1975)]. Here, unlike in Earnest, appellant was not sentenced to minimum three-year term of imprisonment; thus, we are not concerned with §775.087(2).

The Supreme Court in Earnest did not in any way abrogate §777.011, Florida Statutes (1975), dealing with principals in the first degree. That statute provides that whoever aids, abets, counsels, hires or otherwise procures an offense to be committed and such offense is committed is a principal in the first degree and may be charged, convicted and punished as such whether he is or is not actually or constructively present at the commission of such offense. That statute makes an aider and abettor a principal in the first degree to the crime he aids and abets. Here, the evidence clearly shows that appellant was present aiding and abetting his accomplice in the accomplice's commission of the crime of robbery with a firearm. Thus, appellant is guilty as a principal in the first degree of that crime rather than the crime of robbery in which the offender carried no firearm, deadly weapon, or other weapon.

AFFIRMED.

BOYER, J., and McLANE, RALPH M., Associate Judge, CONCUR.

IN THE DISTRICT COURT OF APPEAL
FIRST DISTRICT OF FLORIDA

VINCENT ANTHONY BUSH, :
Petitioner, :
v. : DCA DOCKET NO. GG-445
STATE OF FLORIDA, : SUPREME COURT CASE NO. _____
Respondent. :

NOTICE

NOTICE IS HEREBY GIVEN that Vincent Anthony Bush, petitioner, invokes the certiorari jurisdiction of the Supreme Court to review the decision of this Court rendered February 27, 1978.

The decision is in direct conflict with a decision of the Supreme Court of Florida on the same question of law. Jurisdiction of the Florida Supreme Court is invoked pursuant to Article V, Section 3(b)(3) of the Florida Constitution and Florida Rule of Appellate Procedure 9.030(a)(2)(A)(iii).

Petitioner has been adjudged insolvent and is represented by appointed counsel.

Respectfully submitted,

MICHAEL J. MINERVA
Public Defender
Second Judicial Circuit

Attorney for Petitioner

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been hand delivered to Mr. Raymond L. Marky, Assistant Attorney General, The Capitol, Tallahassee, Florida, and a copy has been mailed to the petitioner, Mr. Vincent Anthony Bush, #054109, Cross City Correctional Institution, P.O. Box 1500, Cross City, FL, this 25th day of March, 1978.

MICHAEL J. MINERVA

IN THE SUPREME COURT OF FLORIDA
FRIDAY, JUNE 30, 1978

VINCENT ANTHONY BUSH, **
Petitioner, **
vs. **
STATE OF FLORIDA, **
Respondent. **

CASE NO. 53,689
District Court of Appeal,
First District
GG-445

This cause having heretofore been submitted to the Court on jurisdictional briefs and portions of the record deemed necessary to reflect jurisdiction under Fla. R. App. P. 9.120, and it appearing to the Court that it is without jurisdiction, it is ordered that certiorari is denied.

No Motion for Rehearing will be entertained by the Court. See Fla. R. App. P. 9.330(d).

OVERTON, C.J., ENGLAND, SUNDBERG and ALDERMAN, JJ., Concur
ADKINS, BOYD and HATCHETT, JJ., Dissent

A True Copy
TEST:

Sid J. White
Clerk, Supreme Court

By: Deputy Clerk

cc: Hon. Raymond E. Rhodes, Clerk
Hon. S. Morgan Slaughter, Clerk
Hon. Dorothy H. Pate, Judge

Michael J. Minerva, Esquire
Raymond L. Marky, Esquire

JUL 7 - 1978

In The Circuit Court
of the Fourth Judicial Circuit of Florida
in and for
The County of Duval, State of Florida

Fall Term, seventy-six

STATE OF FLORIDA
vs

TONY RICHARD MILLER, and
VINCENT ANTHONY BUSCH, also known as
Vincent Anthony Bush

CASE NO: 77 233

DIVISION: S - CF

STATUTE NO: 812.13 & 775.087

INFORMATION FOR

ROBBERY

IN THE NAME OF AND BY AUTHORITY OF THE STATE OF FLORIDA.

ED AUSTIN, State Attorney for the Fourth Judicial Circuit of the State of Florida, in and for Duval County charges that TONY RICHARD MILLER and VINCENT ANTHONY BUSCH, also known as Vincent Anthony Bush, on the 27th day of June, 1976, in the County of Duval and State of Florida, did by force, violence, assault or putting in fear, take away from the person or custody of MAE CATES, certain property, to-wit: money of the value of more than One Hundred Dollars ($100.00), the property of Dr. William Frank McNabola, trading and doing business as HEART OF JACKSONVILLE MOTOR HOTEL, INC., a corporation, and in the course of committing said Robbery, carried a firearm, to-wit: a pistol, and while perpetrating the offense or attempting to perpetrate the offense had in their possession a firearm or destructive device, to-wit: a pistol, contrary to the provisions of Sections 812.13 and 775.087, Florida Statutes.

STATE OF FLORIDA
COUNTY OF DUVAL
Personally appeared before me,

F. Joseph DuBray

Assistant State Attorney, for the Fourth Judicial Circuit of the State of Florida, in and for Duval County, who being first duly sworn, says that the allegations as set forth in the foregoing information are based upon facts that have been sworn to as true, and which, if true, would constitute the offense therein charged, and that this prosecution is instituted in good faith and he/she certifies that testimony under oath has been received from the material witness(es) for the offense. Sworn to, and subscribed before me this 21st day of January 19 77

Barbara M. [illegible]

ED AUSTIN, STATE ATTORNEY
FOURTH JUDICIAL CIRCUIT OF FLORIDA
IN AND FOR DUVAL COUNTY

By F. Joseph DuBray
Assistant State Attorney

S. MORGAN SLAUGHTER, Clerk of the Circuit Court, Fourth Judicial Circuit of Florida, in and For Duval County, and Clerk of the County Court, Duval County, Florida.

FILED THIS JAN 21 1977

BY DEPUTY CLERK [illegible]

MRW/rq
Dkt AD
Cap No Bnd
Ext. C S
S/W

TRM: 77-191-1 MORE
VAB: 77-858-1 MORE
TRM: 1/24/77
VAB: 1/24/77

R-6

IN THE CIRCUIT COURT, IN AND FOR DUVAL COUNTY, FLORIDA.

CASE NO: 77-289-CF
DIVISION: S-CF

STATE OF FLORIDA,

Plaintiff,

vs.

TONY RICHARD MILLER, and VINCENT ANTHONY BUSCH, Also Known As, VINCENT ANTHONY BUSH,

Defendants.

THIS INSTRUMENT IN COMPUTER

FILED
APR 19 1977
S. Morgan Slaughter
CLERK - CIRCUIT COURT

MOTION TO SUPPRESS

Comes now the Defendant, VINCENT ANTHONY BUSH, by and through his undersigned Attorney, and moves the Court to suppress the statement signed by the Defendant, VINCENT ANTHONY BUSH, on January 11th, 1977, and for grounds for said Motion would show that said statement is unconstitutional and was not freely and voluntarily given nor is the statement a complete and accurate resume of the statement of the Defendant, VINCENT ANTHONY BUSH.

I DO HEREBY CERTIFY that a copy of the foregoing has been furnished to Michael R. Weatherby, Esquire, State Attorney's Office, Duval County Courthouse, Jacksonville, Florida, by Hand Delivery on this 19 day of April, 1977.

F. CLYDE REESE
Attorney for Defendant, Vincent Anthony Bush
137 E. Forsyth Street - Suite 316
Jacksonville, Florida 32202
Telephone: (904) 355-2931

R-7

IN THE CIRCUIT COURT, IN AND FOR DUVAL COUNTY, FLORIDA.

CASE NO: 77-289-CF
DIVISION: S-CF

STATE OF FLORIDA,

Plaintiff,

vs.

TONY RICHARD MILLER and VINCENT ANTHONY BUSCH, Also Known As, VINCENT ANTHONY BUSH,

Defendants.

THIS INSTRUMENT IN COMPUTER

FILED
APR 21 1977
S. Morgan Slaughter
CLERK - CIRCUIT COURT

AMENDED MOTION TO SUPPRESS

Comes now the Defendant, VINCENT ANTHONY BUSCH, Also Known As, VINCENT ANTHONY BUSH, by and through his undersigned Attorney, pursuant to the applicable Rules of Criminal Procedure and moves the Court to suppress the written statement and for grounds for said Motion would show that the Defendant was arrested on January 11th, 1977, without a warrant at approximately 9:30 O'Clock A.M., that morning. That he was asleep in his home when officers entered and on being wakened, there were two (2) officers of the Jacksonville Sheriff's Office with guns pointed directly at his head at a distance of less than two yards. That he was taken from his home to the Duval County Jail by these and other officers and at 1:20 O'Clock P.M., that afternoon, signed a statement which was written for him by one of the officers who had been questioning him.

1. The statement was illegally obtained without a warrant.

2. There was no probable cause for his arrest.

3. The officers should have taken him to a magistrate or other judicial officer.

4. There was no crime committed in the presence of the officers nor did they have probable cause to believe that the Defendant had committed a crime.

5. Said arrest and written statement was unlawful, void and in violation of Defendant's constitutional and legal rights.

F. CLYDE REESE
Attorney for Defendant,
Vincent Anthony Bush
137 E. Forsyth Street, Suite 316
Jacksonville, Florida 32202
Telephone: (04) 355-2931

I HEREBY CERTIFY that a copy of the foregoing Amended Motion to Suppress has been furnished to Michael Weatherby, Esquire, State Attorney's Office, Duval County Courthouse, Jacksonville, Florida, by Hand Delivery, on this 21 day of April, 1977.

F. CLYDE REESE
Attorney for Defendant,
Vincent Anthony Bush
137 E. Forsyth Street, Suite 316
Jacksonville, Florida 32202
Telephone: (904) 355-2931

THE COURT: All right, court will be in recess until 1:30.

(Noon recess.)

(Jury absent.)

THE COURT: Bring Mr. Busch out.

(Defendant present.)

THE COURT: The Jury was excused until 2:30 so I would not anticipate they would be back.

All right, Gentlemen, the Jury, of course, is in recess until 2:30 and at this time it would be appropriate to have the motion to suppress.

MR. REESE: I think so.

MR. WEATHERBY: I think that would be the thing to do at this time, yes, ma'am.

MR. REESE: Your Honor, we had a witness on the stand. It seems to me his testimony should be completed. I don't know what he is going to say, but subject to the Court's ruling, it seems to me we ought to finish it and have him testify or not.

MR. WEATHERBY: Well, we don't have a Jury at the moment, Judge.

MR. REESE: True, but I was going to

MARIE SPLANE
OFFICIAL COURT REPORTER
JACKSONVILLE, FLORIDA 32202

ask for a proffer on his testimony. I don't know if I have got the right to do it.

THE COURT: As to Mr. Winters?

MR. REESE: Yes, to see what he's going to testify to. There's such a conflict here, it seems to me, outside the province of the Jury that we ought to find out whether or not there was an agreement, what it was and all that kind of business.

MR. WEATHERBY: Your Honor, I don't intend to ask Mr. Winters any further questions, I don't think.

THE COURT: You don't intend to ask him any questions?

MR. WEATHERBY: Any further than what has transpired already, at this point, anyway.

THE COURT: All right, it would appear to the Court that the basis has been laid sufficient for the motion to suppress to be taken up at this time.

All right, Mr. Weatherby, on the motion to suppress do you have some evidence to present?

MR. WEATHERBY: Yes, Your Honor.

Detective Terry is here. Your Honor, Detective Terry has not been sworn, but I have advised him that the rule of secrecy has been invoked.

THE COURT: Fine.

I know that you are familiar with that rule, right?

MR. TERRY: Yes, ma'am.

THE COURT: Would you raise your right hand and be sworn by the Clerk?

(Witness sworn by Clerk.)

THE COURT: You may proceed.

MR. WEATHERBY: Thank you, Your Honor.

J. W. TERRY, JR.,

was called as a witness on behalf of the State, and after having been first duly sworn, then testified as follows:

DIRECT EXAMINATION

BY MR. WEATHERBY:

Q Would you state your name and place of employment?

A J. W. Terry, Jr., employed by the Office of the Sheriff, Duval County.

Q And how long have you been so employed, sir?

A Approximately seven and a half years.

Q What is your present duty assignment, sir?

A Investigator in detective division.

Q Consistent with those duties, did you have occasion -- well, let me ask you this: Were you so employed in that division on or about the 11th of January, 1977, sir?

A Yes, sir, I was.

Q In what particular division were you assigned at that time?

A I was assigned to robbery detail.

Q On that date, Detective Terry, did you have occasion to come in contact with a one Vincent Anthony Busch?

A Yes, I did.

Q Do you see that person in the Courtroom today?

A Yes, sir.

Q Where is that person, sir? Would you describe what he's wearing?

A Sitting right at the table out there (indicating). He has on a white shirt.

MR. WEATHERBY: Could the record

reflect he has identified the defendant, Your Honor?

THE COURT: The record will so reflect.

BY MR. WEATHERBY:

Q What were the circumstances you first came into contact with Mr. Busch on that day, Detective Terry?

A I assisted Detective Kearney of robbery detail and Bradley of the homicide detail going to pick Mr. Busch up in the morning. I think it was in the late morning hours, 10:30, 11:00 o'clock, somewhere around there.

Q All right, sir. And where were you looking for Mr. Busch?

A I was advised by Detective Kearney that they had information that the defendant was involved in a robbery of the Heart of Jacksonville Motel.

Q And did you come in contact with Mr. Busch at that time?

A Yes, sir, I did.

Q Where was that, sir?

A He was at a residence. I don't recall the exact address without referring to a form that I had obtained from Mr. Busch later, but he was asleep on the couch in the living room and we arrested Mr. Busch

at this time. He was transported to the robbery office.

Q Would you describe the circumstances of the arrest, Detective Terry? What happened?

A What do you mean?

Q Well, what happened? You went to the house, you knocked on the door. What happened next?

A We went to the house. We identified ourselves. We were admitted to the house, went in -- I assume it was the living room.

Q Who answered the door?

A I don't recall who it was, sir. There was a number of people there in the house.

Q All right, sir. How did you identify yourselves?

A By showing our badges, told them that we were police officers from the Sheriff's Office.

Q Were you in uniform or in civilian clothing?

A We were in civilian clothes.

Q Did you have a uniformed officer with you?

A Yes, sir, we did. I'm not sure whether he was at the front door or not, but we went into the house and Mr. Busch was, like I say, asleep on the couch. We woke him up, advised him who we were, identified ourselves to him in the same manner,

advised him he was under arrest.

Q Did you at any time have occasion to use your weapons while at that residence?

A I believe the weapons were drawn.

Q Why was that?

A Well, due to the nature of the arrest. It was a serious felony.

Q Did you have occasion to return your weapons to the holsters?

A Yes, sir.

Q Approximately at what point?

A After we saw there would be no resistance to the arrest and which there wasn't. At this time Mr. Busch was taken to the -- or brought down to the Courthouse to the robbery office.

Q Did you place him in handcuffs?

A Yes, sir.

Q And how was he transported to the robbery office?

A I believe Detective Kearney and I transported him in our vehicle.

Q And at some point that morning -- do you remember approximately what time you arrived at the robbery office?

A It was shortly after 11:00 o'clock, sir.

Q And where is the robbery office, Detective Terry?

A It's on the fifth floor of the Courthouse.

Q Will you describe that office, sir?

A Yes, sir. You enter the main room and there are two other rooms. One is a room occupied by the supervisors, lieutenant and the sergeant, and the other is an interview room.

Q Approximately how large a room is it?

A The interview room?

Q Yes.

A I'd say approximately twelve by fifteen.

Q I'm sorry?

A Twelve by fifteen, approximately.

Q What is the nature of the light in that room, Detective Terry?

A It's average room lighting. The lights are in the ceiling. You have windows in the room.

Q Fluorescent or incandescent like we have in the Courtroom?

A Yes, sir.

Q All right. When you arrived in the Courthouse, did you go immediately to the robbery office with Mr. Busch?

A Yes, sir.

Q Did you make any stops on the way?

A No, sir.

Q When you got to that office -- well, let me ask you this: Did you accompany Mr. Busch?

A Detective Kearney and I both. I also believe Detective Bradley was present.

Q All right, sir. And you went to that office. During the trip from the residence where you apprehended Mr. Busch till the time you got to the Courthouse, were you in Mr. Busch's presence?

A Yes, sir.

Q I mean, did you ride in with him?

A Yes, sir, to the best of my knowledge, I believe that Detective Kearney and I transported him in our vehicle so we were with him all the time.

Q All right, sir. And the three of you then went up or came up to the robbery office after you got to the Courthouse, is that right?

A Yes, sir.

Q All right. What first transpired when you arrived at the interview room?

A Mr. Busch was advised of his constitutional rights, Miranda warnings, a standard rights form, and he admitted or he stated that he understood his rights, and the rights form was witnessed by myself,

Detective Kearney and Detective Bradley.

Q All right, sir. Was Mr. Busch still in handcuffs at this time?

A To the best of my knowledge, the handcuffs were removed once he was in the interview room.

Q All right. Detective Terry, you said you advised him of his rights using a particular form and that that was signed. What did you do with that form after Mr. Busch signed it?

A The form was placed in a case file that Detective Kearney had filed concerning the case.

Q All right, sir. Pursuant to instructions from me, did you have occasion to bring that form with you today?

A Yes, sir, I did.

Q Would you please produce it?

(Witness producing document.)

Q All right. This is the form that you utilized on the 11th of January?

A Yes, sir.

Q And what you just told the Court about?

A Yes, sir.

Q How do you know that this is the same form, sir?

A I recognize the form by my signature at the

bottom, Detective Kearney's signature in the middle, and Detective Bradley's signature as witnesses to the form.

Q All right. Will you please describe to the Court how the rights were administered or how Mr. Busch was advised of his rights, consistent with the use of this form?

A The rights were read from the form verbatim pursuant to the Miranda decisions and after each right was read to Mr. Busch, he was asked if he understood it.

Q All right. And did he indicate -- what was his response?

A He indicated he understood his rights.

Q All right. Would you please read for the record the statement there that you have?

A It's, "Your constitutional rights." It's, "place advised, robbery office." The date is the 11th, January, 1976. Time 11:40 a.m.

"You have the following rights under the United States Constitution. You don't have to make a statement or say anything. Anything you say can be used against you in court.

"You have the right to talk to a lawyer for advice before you make a statement or before any

questions are asked of you and to have the lawyer with you during any questioning. If you cannot afford to hire a lawyer, one will be appointed for you before any questioning if you wish. If you decide to answer questions now without a lawyer present, you still have the right to stop answering at any time. You may also stop the questioning at any time and consult with your appointed or privately employed lawyer."

The bottom of the rights form is, "Waiver of rights." It says, "I have read the above statement of my rights and understand the statement and understand what my rights are and I'm willing to make a statement and answer questions. I do not want to talk to a lawyer at this time. I have not been promised anything in exchange for a statement. I have not been threatened and there has been no pressure to get me to make a statement or answer questions." It's signed Vincent Anthony Busch. It's witnessed by Detective J. A. Bradley, Detective P. H. Kearney and Detective J. W. Terry.

Q And did you inquire if he understood those rights?

A Yes, sir.

Q And his response?

A That he did understand his rights.

Q Did he ever indicate to you that he wanted to talk to a lawyer?

A No, sir.

MR. WEATHERBY: Your Honor, the State would offer this into evidence as the State's Exhibit A.

THE COURT: A for identification?

MR. WEATHERBY: Yes, ma'am, if you would, A for identification.

THE COURT: All right, Mr. Reese, you are now looking at that exhibit?

MR. REESE: Yes, ma'am. Could I have just a moment?

THE COURT: Certainly.

(Mr. Reese examining document.)

MR. REESE: Your Honor, could I ask some questions of the witness? I would object to the introduction.

THE COURT: All right. This is marking only for identification at this time.

MR. REESE: I'm sorry.

THE COURT: This is a proffer at this stage of the trial. I believe Mr. Weatherby probably has a few more questions that he'd

like to ask.

MR. WEATHERBY: Yes.

BY MR. WEATHERBY:

Q Is that the form that Mr. Busch signed? Did he sign that form in your presence?

A Yes, sir.

Q All right. After you advised Mr. Busch of his constitutional rights by using that form, did you talk to him?

A Yes, sir.

Q Did he make any statements to you?

A Yes, sir. A short time later Mr. Busch gave a statement concerning the robbery which I wrote. It was not verbatim which was explained to Mr. Busch, that it would not be verbatim or word-for-word. After the statement was made, he looked at the statement and agreed basically with what was in the statement.

Q You read the statement to him?

A Yes, sir.

Q And you say he basically agreed with the facts in the statement?

A Yes.

Q All right. Where did you get those facts from, Detective Terry?

A Mr. Busch.

Q You had an oral conversation with him then relating to the robbery?

A Yes, sir.

Q And would you say that you substantially recorded in this statement the facts that he had given you, obviously not verbatim?

A Yes, sir.

Q It pretty well included everything that he had told you in the statement?

A Yes, sir.

Q Detective Terry, was anyone else present while Mr. Busch was giving this statement?

A Yes, sir, Detective Kearney was present.

Q Just the two of you then?

A Yes, sir.

Q During the time -- do I conclude that you were still in the robbery office?

A Yes, sir, in the interview room.

Q In the interview room?

A Yes, sir.

Q During the time that you and Detective Kearney were with Mr. Busch in the interview room, did you ever have occasion to draw your weapon?

A No, sir.

Q Did you ever observe Officer Kearney do that?

A No, sir.

Q During that time, did you ever have occasion to threaten Mr. Busch?

A No, sir.

Q Did you or did Detective Kearney while you were present?

A No, sir.

Q Either physically or verbally?

A No, sir.

Q Did you offer him any form of physical abuse?

A No, sir.

Q Did you offer him any hope of reward if he gave his statement?

A No, sir. We are not authorized to do that.

Q Did you promise him that you would recommend any light sentence to the State Attorney's Office or the Court if he gave a statement?

A No, sir. I think what was told to Mr. Busch is that we would tell the State Attorney or his attorney that he had cooperated, but we could not promise him anything.

Q Did you make any other kind of statements

like that to Mr. Busch?

A No, sir.

Q During the interview in this room, Detective Terry, did anyone else ever come in?

A To the best of my knowledge, they didn't.

Q Did Mr. Busch ever indicate an unwillingness to give you the statement once the interview had started?

A No, sir.

Q After you had -- let me ask you this: Why did you write the statement rather than him?

A It's just standard procedure. That's the only reason I did it.

Q But you did read the statement to him?

A Yes, sir.

Q After you read it, did you give him a chance to look at it?

A Yes, sir.

Q And did he make any comments?

A Except that it was basically what he said.

Q Did you give him an opportunity to sign it?

A Yes, sir.

Q And did anyone else sign that form?

A Did anyone else sign the form?

Q Yes.

A I witnessed the form and Detective Kearney also witnessed it.

Q He signed it in your presence then?

A Yes, sir.

Q What, if anything, happened to that statement after that date, sir?

A It was also put in the same case file as I mentioned before with the rights form.

Q All right. Did you have occasion to bring that today?

A Yes, sir, I did.

Q Pursuant to my instructions?

A Yes, sir.

Q Would you take it out, please?

(Witness producing document.)

Q You have a document here which appears to be handwritten on both sides. It's a one-page sheet. I ask you is there anything out of the ordinary that you recognize about this particular document that comes to your memory or how do you recognize it?

A Well, I recognize it by my handwriting and also by the fact that my signature is on the bottom of it as a witness and also that of Detective Kearney.

Q All right. And this is the same document that you took from Mr. Busch that day?

A Yes, sir.

Q All right. Would you please read the information that's at the top there in the text of that statement?

THE COURT: Mr. Reese, I assume you have received a copy of this statement?

MR. REESE: Yes.

MR. WEATHERBY: Oh, yes.

THE WITNESS: This is a standard statement form and the top of the statement is, "Name, Vincent Anthony Busch." Address is 834 East 6th Street.

BY MR. WEATHERBY:

Q Detective Terry, is that the address that you arrested Mr. Busch at?

A Yes, sir.

Q Please go on. I'm sorry.

A The telephone number is none. Age twenty-four. Occupation is welder. The statement was made at the robbery office, hour 1:20 p.m. The date is 1/11/77.

Q Please go on.

A Do you want me to read the whole statement?

MR. WEATHERBY: Well, actually at this point I think that would be necessary

unless Mr. Busch -- I mean Mr. Reese -- the question before the Court right now is the voluntariness of the statement and I would ask that the Court mark this for identification.

THE COURT: It will be so marked as State's Exhibit B for identification only.

(Whereupon, the foregoing document was marked as State's Exhibit B for identification purposes only.)

BY MR. WEATHERBY:

Q Detective Terry, might I inquire as to how you came to be called to go to Mr. Busch's residence on the morning of the 11th of January?

A Yes, sir. I went to assist Detective Kearney.

Q This statement pertains to a robbery at the Heart of Jacksonville --

A Yes.

Q -- on June -- well, the statement says June of 1976. Do you have any personal knowledge or did you have any knowledge of that crime?

A Yes, I did.

Q And what was that?

A There was a robbery in June of '76 at the

Heart of Jacksonville where a police officer who was working off duty as a security guard was present at the time the robbery was committed and his gun was taken from him.

Q Who was the detective assigned to that case?

A I was.

Q All right, sir. That then is one reason why you were called to participate in interviewing Mr. Busch?

A Yes.

MR. WEATHERBY: I have no further questions at this time, Your Honor.

THE COURT: Do you wish to inquire as to the voluntariness of this statement?

CROSS EXAMINATION

BY MR. REESE:

Q Mr. Terry, do you know what time of day you got to Mr. Busch's house?

A I would say it's sometime later than the morning, Mr. Reese, sometime around between 10:00 and 11:00 o'clock, somewhere around there, mid-morning hour.

Q And do you know when you all had learned of Mr. Busch's alleged involvement in this robbery?

A I was advised by Mr. Kearney either a day or so before. I don't know when. He had obtained the information on it that --

Q Do you know whether anybody had ever applied for a warrant for his arrest?

A No, sir, I don't.

Q Was one acquired?

A At the time he was arrested, I don't believe there was one outstanding.

Q Has one been acquired since?

A I don't know, Mr. Reese.

Q To your knowledge, has a warrant ever been requested?

A To my knowledge, it hasn't. Like I say, I don't know.

Q Were you ever told that Mr. Winters had identified Mr. Busch as a participant on January the -- Januray the 3rd or sometime in there?

A The only thing I was told, Mr. Reese, is there had been a conversation with Mr. Winters, but I wasn't advised what the conversation was.

Q You were not advised Mr. Busch had been identified at that time?

A No, sir.

Q Okay. When you went to the house and went

inside, did you and Mr. Kearney both have your guns out?

A I know Mr. Kearney had his out. I believe I had mine out. I'm not sure right now.

Q And did you point them at him when you woke him up?

A Yes, sir.

Q And where did you point it at him? Head? Foot?

A No particular -- I mean it wasn't pointed at his foot.

Q I wouldn't think so, but --

A No.

Q At his body?

A At his body, yes.

Q And how far from his body would you say the gun was when you --

A We were standing approximately two to three feet from him.

Q And your gun would have been closer yet, is that true?

A Not necessarily, no, sir.

Q Well, was it, in fact, closer to him?

A I'd say the gun was about three feet from him.

Q And was Mr. Kearney in the same location and the same distance?

A Yes, sir.

Q On opposite sides of the bed or together or --

A We were standing side by side.

Q In any event, Mr. Busch offered no resistance, is that correct?

A That's correct.

Q And when he was handcuffed and taken down, do you know where in the process his handcuffs were taken off?

A I believe they were taken off in the interview room of the robbery office.

Q At what time?

A Shortly after we got there.

Q Are you quite sure that the uniformed officers didn't transport Mr. Busch there?

A I said before I'm not sure they did not, to the best of my knowledge. It's been some time ago. To the best of my knowledge, Kearney and I probably transported him.

Q And in the interview room itself, did you and Officer Kearney and Officer Bradley have your weapons with you?

A Yes, sir.

Q And were they visible?

A They could have been, I imagine.

Q All right. Excuse me for interrupting you. Where were you wearing them? Where were they on your body?

A In a holster.

Q And where was the holster?

A On the side. Mine was.

Q And was your coat on or off?

A I assume the coat was off. I'm not real sure whether it was or not.

Q And would the same be true of Mr. Kearney?

A Yes.

Q If you recall, how about Mr. Bradley?

A I believe the same would be true of him also.

Q Did anybody else ever come in the room other than uniformed officers? I mean -- not uniformed -- officers and Mr. Busch?

A No, sir.

Q Did anybody appear to take a written statement?

A I took a written statement.

Q Was it taken electronically?

A No, sir.

Q Any video tape made of it or anything like that?

A No, sir.

Q No recording? And where in the process did Mr. Bradley leave?

A I think Mr. Bradley left shortly after he was advised of his rights.

Q Can I ask you why nobody asked for a warrant?

A I don't know, Mr. Reese. It's like I stated before, I had just received this information possibly a day or so before and due to the lack of leads that I had at the time working the robbery, I had suspended the case and at this time due to the information that had been received by Detective Kearney and Bradley, they reopened the case and I don't know why they did not request a warrant. I don't know that they didn't.

Q Did anybody make inquiry as to whether Mr. Busch -- what his mental condition was, whether he was sick, anything like that?

A From the appearances of Mr. Busch and the way he reacted and talked, he didn't appear to have any mental condition.

Q Would you answer my question? Do you know?

A No, sir.

Q What led you to believe that you had probable cause to arrest Mr. Busch?

A On the information that Detective Kearney and Bradley had obtained and it was relayed to me and --

Q And what was that?

A They said they had obtained information from a reliable source he had been involved in the robbery at the Heart of Jacksonville Motel and asked if I would assist them in going to arrest him, which I did.

Q Did they identify the reliable source?

A No, sir, not at the time.

Q And you don't know right now who it was, the reliable source was?

A I know now who it is. I didn't at the time.

Q Johnny Winters?

A Yes, sir.

Q Did he strike you as being a reliable source?

A I don't know. I've never had any dealings with Johnny Winters.

Q Are you familiar with his record?

A No, sir, not that much.

Q Do you know that he's been convicted of

several felonies, admitted to some sixty-odd robberies?

A I know that now. I didn't know it at the time.

Q Had you known at the time -- had you known it, would you have thought he was a reliable witness?

A I wouldn't say. I wouldn't know. I don't know the dealings. I don't know how well Mr. Kearney knew Mr. Winters or Mr. Bradley. I don't know whether they had any dealings with him before or not. I couldn't establish his reliability without having talked to the man myself.

Q My question is: Do you think he's a reliable witness with what you have learned of him since?

A I don't really know, Mr. Reese. I couldn't answer that yes or no.

Q You have learned since that he's killed somebody?

A Yes, sir.

Q He's threatened to kill a police officer?

A I didn't know he had threatened to kill a police officer.

Q At the Heart of Jacksonville, didn't Officer Bramlett say he said, "Don't move or I'll

kill you"?

A Yes, he said that.

Q And he has admitted some fifty or sixty robberies?

A I would -- like I say, I don't think I could answer it yes or no. The only thing I could say is if he had knowledge of the crime and could put this man in the crime, then I would say he would be reliable.

Q Would it be true to say that Mr. Busch talked to you all for some period of time and you synthecized what has been said or what your understanding of the nature of the conversation was and that some things that he said were left out?

A Like I say, the statement was not a verbatim statement, Mr. Reese. I explained that to Mr. Busch before I read the statement and I'm sure that some minor things he said were probably left out because it was not written word for word.

Q I understand that.

A Yes, sir.

Q In other words, you -- I'm not questioning you right now, but what you have here is what he said?

A Yes, sir.

Q I'm asking you if he said things that were

not in here.

A Probably, yes, sir.

MR. REESE: Your Honor, I have no further questions.

REDIRECT EXAMINATION

BY MR. WEATHERBY:

Q Mr. Terry, is there anything in the statement that he did not tell you?

A Pertaining to the robbery?

Q Right.

A No, sir.

Q Are you aware that or did you become aware or were you aware at the time of the arrest that the source that Detective Kearney was talking about who you have found out later was Johnny Winters was the person involved in the Heart of Jacksonville robbery?

A I knew it after he was arrested and I talked to him.

Q But you went along to assist Officer Kearney in the arrest?

A Yes, sir.

Q And it was your understanding that it was Officer Kearney's -- that he had the probable cause

to make the arrest, is that correct?

A Yes.

Q All right. Now, subsequent to that you have found, I believe, that it was Johnny Winters who made the statement to Detective Kearney?

A Yes, sir.

Q That Johnny Winters, in fact, confessed his participation in the Heart of Jacksonville robbery, is that correct?

A Yes.

Q And, in fact, during that statement he implicated Mr. Busch?

A Yes, sir.

Q And it has subsequently become -- has come to your attention that that is the reason that Detective Kearney went out looking for Mr. Busch; is that correct?

A Yes, sir.

MR. WEATHERBY: All right, I have no further questions, Your Honor.

Your Honor, I would offer the statement as having been voluntarily given.

THE COURT: All right, Mr. Reese.

MR. REESE: Your Honor, I would object to the statement.

THE COURT: Certainly.

MR. REESE: First, there has been no showing of a chain of possession. Secondly, there is no probable cause to arrest because -- well, then, third, that they had a chance to get a -- to go before a Court and get a warrant which they did not do; that Mr. Busch was arrested at close gunpoint, taken in handcuffs to a station and in a room with three officers who had guns and was not forcibly coerced, but was scared and that there is no showing it is voluntary and, under the circumstances, it could not have been voluntary.

THE COURT: And I assume that you do not wish to present any evidence yourself on this matter?

MR. REESE: I would like Mr. Busch to testify on this. He's not going to testify at the trial.

THE COURT: Well, I think he certainly can on the nature of voluntariness.

Can we excuse Detective Terry?

MR. WEATHERBY: Are we at the point of arguing or is Mr. Busch going to testify?

THE COURT: Well, I think if there is further evidence to come before the Court we need that.

MR. WEATHERBY: Your Honor, I would reserve the right to recall Detective Terry after Mr. Busch testifies.

THE COURT: You may step outside.

(Witness excused.)

MR. WEATHERBY: Your Honor, may we have just a moment?

THE COURT: Yes, sir.

(Mr. Weatherby conferring with Mr. Reese.)

MR. WEATHERBY: Your Honor, we'd be ready to hear from Mr. Busch at this point.

THE COURT: All right, Mr. Busch, do you want to come forward and be sworn in, please?

(Defendant sworn by Clerk.)

THE COURT: You can have a seat in the witness stand.

VINCENT ANTHONY BUSCH,

was called as a witness in his own behalf, and after having been first duly sworn, then testified as

follows:

DIRECT EXAMINATION

BY MR. REESE:

Q Could you give me your name, please, sir?

A Vincent Anthony Busch.

THE COURT: Mr. Busch, you are going to have to speak out a little louder.

BY MR. REESE:

Q And how old are you, Mr. Busch?

A Twenty-four.

Q And where do you live?

A 434 East Sixth Street.

Q And were you living there on January 11th, 1977?

A Yes, sir.

Q Do you remember officers coming to the house?

A Yes, I do.

Q Tell us what was the first thing you remember.

A Well, I was half asleep and somebody knocked on the door and my sister answered the door. They just knocked on the door and came on in. Then I asked them -- my brother was standing on the staircase and I saw him keep pointing like this

here (indicating). I didn't know if they had a gun pointed at him or not, which I found out later they had mistaken him for me.

Q Okay. And what did the officers do?

A They came around into the living room and pointed a gun at me. I just looked at them and told them I got to be dreaming and covered back up.

Q And how many officers were there?

A Three.

Q And were they pointing guns at you?

A Yes, sir.

Q And how close were they?

A About from here -- from where I am to where she is now (indicating).

Q And where were the weapons pointed?

A In the vicinity mostly of my head and chest.

Q Did you offer any resistance?

A Uh-uh (negative).

Q All right. What happened next?

A Well, he told me to come from under -- bring my arms from under the covers slowly and don't try no false movements or anything. So, I did what they asked and after I did this, then he kind of removed the pillows off the sofa and went to

searching and I asked him what he was searching for. He told me he was searching for an officer's gun that was taken in a robbery.

Q Did anybody ever show you a warrant for either a search or arrest?

A No. I asked him what I was being -- what was the nature of this arrest. He said for murder.

Q For murder?

A (Nodding head affirmatively.)

Q Who said that? Do you remember?

A One of the officers said it.

Q Okay. What happened then?

A So, they got up -- well, got up and started -- well, I went to put on my clothes and shoes and before I could do that they just handcuffed me. My sister threw a jacket over me and they took me down the street to a police car, put me in and they transported me from where I lived at to the Courthouse down here.

Q And who transported you?

A Uniformed officers.

Q Was Mr. Terry who just testified -- did he transport you down here?

A No.

Q All right. What happened next?

A I went up to the robbery office and they were sitting down talking. They say, "Well, we know all about the robberies you were in with Winters." I said, "How you know? I don't know about that myself." He said, "Well, we talked to Winters and we made a tape." And I asked him could I listen to some of it, so they started playing the first part saying, well, there was something about I was supposed to have been mixed up in the murder, when the bellhop came out of the elevator or something I was standing by the elevator and shot him. Then they stopped the tape.

Q All right. What happened then?

A Then they went outside and talked for a few minutes. One of them came back and started reading my rights and I signed that and one of them left out again and one would leave out and one would come in.

Q Would the officers -- did the officers have their guns on? Were they visible to you?

A Yes. They was hanging up under their shoulder. One of the officers got in a conversation about weapons and I told him I didn't know the difference between a .38 or a .357.

Q All right. And did you tell the officers

the things that were in this statement?

A Yes, I did.

Q And did you tell them other things?

A I told them some of the things that was in the statement.

Q What did you tell them that's not in here?

A Well, he asked me about -- he say, "Do you know anything about the Heart of Jacksonville?" I say, "Yes, I do." He asked me what. I say, "Well, on that particular day me and Johnny Winters was sitting where -- Johnny Winters was across the street to a friend of his house and he saw me and came over. We were sitting on the porch talking. Johnny Winters told me, say, 'I have got to go deliver a package. If you want to come along you can make forty or fifty dollars.' " I told him, "Okay." So, we went to the hotel. He say, "I got to go up here and check with this man. I'll be right back." I went upstairs walking around and he say, "Well, the man must not be in." He walked around the desk. Okay. I went around the other side of it. I walked around the side of the desk and when I came back Johnny Winters already had a gun on the people and everything.

Q All right.

A So, at this point he said -- he told me to

come back and tie everybody up and I hesitated for a few minutes and he told me again so I just went on and did what he asked.

Q Why did you do that?

A Well, one reason, if I had ran I don't know what would have happened. If I had left there at that time, there is no telling what might have happened.

Q Did you tell them all this at the office?

A Yes.

Q Did you tell them that you did not participate willingly?

A Yes, I did.

Q When did they tell you what you had been arrested for?

A After they got me down to the office they say, "Well, you was" -- they didn't -- they just kept telling me I was arrested for murder and after I got over here to the jailhouse, then they booked me. Then I saw I was arrested for robbery and murder.

MR. REESE: I have nothing further.

THE COURT: Mr. Weatherby.

CROSS EXAMINATION

BY MR. WEATHERBY:

Q Mr. Busch, I would remind you that you are under oath to tell the truth.

Did either of the detectives that were in the office with you ever threaten you with those weapons?

A Not that I know of.

Q Did they ever strike you with the weapons?

A No.

Q Did they ever hit you with their hands?

A No.

Q As a matter of fact, they were pretty gentlemanly about the whole thing, weren't they?

A Yeah.

Q And it's your testimony here this morning that you never told the officers what is in that statement?

A I said I didn't ever tell them. I told them some of the things that was in there, but some of the things that I told them they did not put in there.

Q I'm sorry. I misunderstood. But you at least acknowledge that some of the stuff that is in the statement is true?

A Right.

MR. WEATHERBY: I have no other

questions, Your Honor.

MR. REESE: I have nothing further.

THE COURT: Mr. Busch, do you recall about how long you were up in the office?

THE WITNESS: Let me see. They picked me up that morning sometime between 9:30 and 10:00 and I didn't get over to the jailhouse until that evening sometime, a little after 2:00 or 1:30, somewhere in there. I can't be certain for sure, because there wasn't no clock around.

THE COURT: All right. I don't have any further questions.

MR. WEATHERBY: Your Honor, I have no other questions.

THE COURT: You may step down, Mr. Busch. Resume your seat out there.

MR. WEATHERBY: Your Honor, to save the Court some time and perhaps answer some questions the Court might have, I'd like to state certain facts and I think possibly Mr. Reese might be willing to stipulate to them. As to your last question, the time involved, what Officer Terry did not testify to was that other

statements were taken from Mr. Busch. I had not mentioned this since we're on a proffer.

THE COURT: I realized after I asked that question I was probably getting into that area.

MR. WEATHERBY: That I think explains the time period. I do not intend to ask Officer Terry of any other statements during the presentation of evidence. The other thing is that I believe that Mr. --

(Mr. Weatherby conferring with Mr. Reese.)

MR. WEATHERBY: All right, Your Honor, the stipulation is Mr. Busch was, in fact, arrested for murder and I believe that we would both stipulate that that charge was -- he was, in fact, booked for that charge. That was based on information that Winters had given them that also pertained to another case, the Ambassador robbery, and the policy being to simply book for the highest charge.

MR. REESE: That's correct. If we might have just a minute.

(Mr. Reese conferring with Mr. Weatherby.)

MR. WEATHERBY: The murder charge is not pending, was never filed against Mr. Busch, Your Honor.

THE COURT: All right.

MR. WEATHERBY: Did we have a stipulation?

MR. REESE: Yes, that is agreeable.

THE COURT: All right, fine. Thank you.

All right, any further evidence as to the motion to suppress?

MR. REESE: No, ma'am.

MR. WEATHERBY: I think not, Your Honor.

THE COURT: Then I'd be happy to hear from Counsel as to any argument. I know that you have made a portion of your argument which I remember.

MR. REESE: I would just renew that and again say that he was alone in a room and he said some things and some things are not in there. I would stand on the other things that I have said.

THE COURT: All right, thank you,

Mr. Reese.

Mr. Weatherby.

MR. WEATHERBY: Your Honor, that, of course, is the defendant's position, but I don't think that goes to the voluntariness of the confession. Mr. Busch himself acknowledged on the stand that the officers were quite gentlemanly and he was never threatened into giving a statement which is consistent with what Officer Kearney said -- excuse me -- Detective Terry said. Speaking to the motion to suppress, Your Honor, I would suggest to the Court the Florida Statutes that provide that an arrest warrant is not necessary where a police officer has probable grounds or probable cause to believe that a person is committing or about to commit a felony somewhere in the state and the statement from Detective Kearney -- from Detective Terry pertaining to the information which was available to Detective Kearney at that time was certainly sufficient probable cause to believe that Mr. Busch had involvement in it; therefore, there was sufficient

grounds for arrest, notwithstanding the lack of the issuance of an arrest warrant.

THE COURT: All right. Anything further before I rule as to the voluntariness of the statement?

MR. REESE: Your Honor, of course, I think we said earlier we would say that there was no probable cause.

THE COURT: Right. All right. considering all the evidence, including Mr. Busch's testimony, the Court would find that the statement was freely and voluntarily made and that would be therefore admissible.

All right, Gentlemen, we have the Jury, I think, all present. Would you all like a few minutes before we call the Jury in or--

MR. WEATHERBY: I'd like just a moment with Mr. Carlisle, Your Honor, and I believe we could commence as soon as the Jury gets back. I feel we should take them back into the room first.

THE COURT: All right, let's recess then for ten minutes.

(Recess.)

(Jury absent.)

THE COURT: We need to recall the witness, Mr. Winters.

MR. WEATHERBY: Your Honor, Mr. Carlisle is in the process of acquiring him, I think. Here he is.

THE COURT: All right, Mr. Winters, if you will take your seat in the stand again.

All right, Mr. Weatherby, anything before we bring the Jury out?

MR. WEATHERBY: No, Your Honor. I request that we bring the Jury out.

(Jury present.)

THE COURT: All right, Mr. Weatherby, you may proceed.

MR. WEATHERBY: Your Honor, at the last juncture of the trial Mr. Winters had exercised his Fifth Amendment right to remain silent and I have no questions.

MR. REESE: We have no questions.

THE COURT: All right, Ladies and Gentlemen, the witness has exercised a constitutional right to remain silent and at this time, Mr. Winters, you are excused

MARIE SPLANE
OFFICIAL COURT REPORTER
JACKSONVILLE, FLORIDA 32202

IN THE CIRCUIT COURT, FOURTH JUDICIAL CIRCUIT, IN AND FOR DUVAL COUNTY, FLORIDA

CASE NO. 77-239 CF A

DIVISION: S

STATE OF FLORIDA

—vs—

(A)TONY RICHARD MILLER
(B) VINCENT ANTHONY BUSCH
also known as, VINCENT ANTHONY BUSH

ORDER

This cause coming on before the Court upon the (Defendant's) (~~Xxxxx~~ MOTION TO SUPPRESS

filed herein on the 19th day of APRIL, 1977, and the Court having heard arguments of the State's attorney and of counsel for defense, and being fully advised in the premises, it is thereupon

ORDERED AND ADJUDGED that the aforesaid MOTION shall be and the same is hereby denied as to defendant (B) Vincent Anthony Busch

DONE AND ORDERED in Open Court at Jacksonville, Duval County, Florida, this 28th day of April, 1977

Circuit Judge

R-56

VOL 4414 PG 343
OFFICIAL RECORDS

IN THE CIRCUIT COURT OF DUVAL COUNTY, FLORIDA

Case Number 77-239 CF

Division S

IN THE CIRCUIT COURT OF DUVAL COUNTY, FLORIDA

STATE OF FLORIDA

vs

Vincent Anthony Busch (B)
Defendant

FILED
JUN 22 1977
S. Morgan Slaughter
CLERK - CIRCUIT COURT

JUDGMENT AND SENTENCE
(STATE PRISON)

You, Vincent Anthony Busch

being now before this Court, attended by your attorney, C. Reese

and you having been tried and found guilty of the crime of ~~entered a plea of guilty to the crime of~~ ~~entered a plea of Nolo Contendere~~ Robbery (Armed)

The Court adjudges you guilty of said offense. Do you have any cause to show why sentence of the law should not be pronounced upon you, or anything to offer in mitigation of sentence? Saying nothing sufficient, it is the sentence of the law and judgment of the Court that you be committed to the custody of the Division of Corrections of the State of Florida, to be imprisoned at hard labor for the term of 35 years, with Credit For 162 Days Jail Time.

in the institution in the State Correctional System to which said Division may cause you to be confined. The Sheriff of Duval County, Florida, is hereby ordered and directed to deliver you to said Division at Lake Butler, Florida, with a copy of this judgment and sentence. In addition thereto, you shall pay the sum of $1.00 for the use of the Florida Police Academy. The Court now advises you that it is your right to appeal from this judgment and sentence within 30 days from this date. You are further advised that you are entitled to assistance of counsel in taking an appeal. Upon your request, and showing that you are entitled to an attorney at the expense of the State, the Court will appoint one for you.

DONE AND ORDERED in Open Court at Jacksonville, Duval County, Florida this 22 day of June, A.D., 19 77.

THIS INSTRUMENT IN COMPUTER

Dorothy H Otte
Judge

FINGERPRINTS

1. R. Thumb	2. R. Index	3. R. Middle	4. R. Ring	5. R. Little
6. L. Thumb	**7. L. Index**	**8. L. Middle**	**9. L. Ring**	**10. L. Little**

I HEREBY CERTIFY that the above and foregoing fingerprints on this Judgment and Sentence are the fingerprints of the defendant, Vincent Anthony Busch, and that they were placed thereon by said defendant in my presence in Open Court this 22 day of June, 19 77.

Fingerprints taken by

V ARGUMENT

POINT I

THE TRIAL JUDGE SHOULD HAVE SUPPRESSED THE APPELLANT'S CONFESSION BECAUSE IT WAS THE RESULT OF AN ARREST OF THE APPELLANT IN HIS HOME WITHOUT A WARRANT AND WITH NO SHOWING BY THE STATE OF EXIGENT CIRCUMSTANCES THAT WOULD HAVE EXCUSED THE ABSENCE OF AN ARREST WARRANT (This point arises from assignment of error no. 5).

The facts of the appellant's arrest are virtually uncontradicted. The officers had talked with an alleged perpetrator of the crime who confessed his involvement and implicated the appellant. This information was learned by the officers at least one day prior to the appellant's arrest. No effort was made to obtain an arrest warrant. The officers went to the appellant's home where several people were present, they entered the home after identifying themselves, they found the appellant asleep on a sofa, and they woke him with guns drawn and placed him under arrest.

The appellant's counsel challenged the admissibility of the statement obtained two hours after the arrest by appropriate pre-trial motion and by argument at the hearing. The State offered no evidence that a warrant had been obtained and no justification for the failure to seek a warrant.

Appellant contends that the confession made by the appellant within two hours of his arrest was the direct result

of unconstitutional custody and the trial judge erred in failing to suppress the statement. The basis of the argument that the custody was unconstitutional is the contention that the warrantless arrest of the appellant in his home violated the appellant's right to be secure in his person and in his house against unreasonable seizures as guaranteed by the Fourth Amendment to the United States Constitution and Article I, Section 12 of the Florida Constitution.

By case decision under federal law, and by express provision in the Florida Constitution, an exclusionary rule is applied to evidence obtained in violation of the prohibition against unreasonable searches and seizures. Specifically as to statements or other evidence resulting from an unlawful seizure of the person the United States Supreme Court has held that evidence, including statements, which is tainted by an illegal arrest cannot be used by the State to prove guilt. Brown v. Illinois, 422 U.S. 590, 45 L.Ed.2d 416 (1975); Davis v. Mississippi, 394 U.S. 721, 22 L.Ed.2d 676 (1969).

Even the giving of the warnings required by Miranda v. Arizona, 384 U.S. 436, 16 L.Ed.2d 694 (1966) cannot automatically dissipate the taint of an illegal arrest because, as the Court noted in Brown, supra, 422 U.S. at 601-603, 45 L.Ed.2d at 426, 427:

> "If Miranda warnings, by themselves, were held to attenuate the taint of an unconstitutional arrest, regardless of how wanton and purposeful the Fourth Amendment violation, the effect of the exclusionary rule would be substantially diluted. See Davis v. Mississippi, 394 U.S. 721, 726-727, 22 L.Ed. 2d 676, 89 S.Ct. 1394 (1969). Arrests made without warrant or without probable cause, for questioning or 'investigation', would be encouraged by the knowledge that evidence derived therefrom hopefully could be made admissible at trial by the simple expedient of giving Miranda warnings. Any incentive to avoid Fourth Amendment violations would be eviscerated by making the warnings, in effect, a 'cure-all', and the constitutional guarantee against unlawful searches and seizures could be said to be reduced to 'a form of words' See Mapp v. Ohio, 367 U.S., at 468, 6 L.Ed. 2d 1081, 81 S.Ct. 1684, 84 A.L.R. 2d 933." (Emphasis added) 422 U.S. at 601-603, 45 L.Ed.2d at 426,427.

This Court has held that when illegal custody is closely followed by the giving of an incriminating statement the Fourth Amendment violation renders the statement inadmissible. R.L.J. v. State, 336 So.2d 132 (Fla. 1 DCA 1976) certiorari pending, case no. 50,253 Florida Supreme Court.

The primary issue, however, is whether the warrantless arrest of the appellant in his home violated privacy interests protected by the prohibitions against unreasonable searches and seizures. This issue has never been squarely resolved

by the United States Supreme Court. The Florida Supreme Court has refused to anticipate the evenutal holding of the Federal Supreme Court on this point and has consequently held that a warrantless arrest of a suspect in his home is lawful pursuant to Section 901.15(3), Florida Statutes (1975). State v. Perez, 277 So.2d 778 (Fla. 1973) cert. den. 414 U.S. 1064.

It is appellant's contention that despite the contrary indications by the Florida Supreme Court in Perez, supra, the Fourth Amendment to the United States Constitution ultimately will be held to prohibit the warrantless arrest of a suspect in his home in the absence of a showing of exigent circumstances. Since this issue was properly raised in the court below it is preserved for appellate review by this Court.

The Fourth Amendment provides:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

Article I, Section 12 of the Florida Constitution contains similar wording.

The provisions of both the federal and state constitutions

contain a reference to obtaining warrants which is commonly known as the Warrant Clause. The United States Supreme Court has construed the Fourth Amendment to mean that the Warrant Clause requires the obtaining of a search warrant prior to law enforcement agents searching premises even though probable cause unquestionably exists. Agnello v. United States, 269 U.S. 20, 70 L.Ed. 145 (1925); Johnson v. United States, 333 U.S. 10, 92 L.Ed. 436 (1948); Jones v. United States, 357 U.S. 493, 2 L.Ed.2d 1514 (1958). Exceptions to the requirement of a warrant for searching premises are limited to "only a few specifically established and well-delineated exceptions" Katz v. United States, 389 U.S. 347, 357, 19 L.Ed.2d 576, 585 (1967). The Florida Supreme Court has recently reiterated this principle in Hornblower v. State, (not yet reported) case no. 49,568 Florida Supreme Court opinion filed October 27, 1977.

The issue now before the Court, however, raises the question of whether a warrant should likewise be required, or an exigency demonstrated, when a person is arrested in his home. This issue was mentioned, but not decided, in Jones v. United States, supra, 357 U.S. 493, 499, 500, 2 L.Ed.2d 1514, 1519 when the Court responded to the government's argument that federal officers had the right to arrest a suspect upon probable cause in his home without a warrant and said:

"These contentions, if open to the Government here, would confront us with a grave constitutional question, namely, whether the forceful nighttime entry into a dwelling to arrest a person reasonably believed within, upon probable cause that he had committed a felony, under circumstances where no reason appears why an arrest warrant could not have been sought, is consistent with the Fourth Amendment. But we do not consider this issue fairly presented by this case, for the record fails to support the theory now advanced by the Government." (Emphasis added).

This same issue was again addressed, but not decided, in a portion of the majority opinion in Coolidge v. New Hampshire, 403 U.S. 443, 29 L.Ed.2d 564 (1971). Justice Stewart noted in Coolidge that it had been argued in dissent that police have the right to arrest upon probable cause without a warrant and without demonstrating exigent circumstances and said:

"If we were to agree with Mr. Justice White that the police may, whenever they have probable cause, make a warrantless entry for the purpose of making an arrest, and that seizures and searches of automobiles are likewise per se reasonable given probable cause, then by the same logic any search or seizure could be carried out without a warrant, and we would simply have read the Fourth Amendment out of the Constitution. Indeed, if Mr. Justice White is correct that it has generally been assumed that the Fourth Amendment is not violated

by the warrantless entry of a man's house for purposes of arrest, it might be wise to re-examine the assumption.

* * *

None of the cases cited by Mr. Justice White disposes of this 'grave constitutional question.' The case of Warden v Hayden, supra, where the Court elaborated a 'hot pursuit' justification for the police entry into the defendant's house without a warrant for his arrest, certainly stands by negative implication for the proposition that an arrest warrant is required in the absence of exigent circumstances. See also Davis v Mississippi, 394 US 721, 728, 22 L Ed 2d 676, 681, 89 S Ct 1394; Wong Sun v United States, 371 US, at 481-482, 9 L Ed 2d, at 451." (Emphasis added) 403 U.S. at 480, 481, 29 L.Ed.2d at 591.

The Court again took up the issue of warrantless arrests in Gerstein v. Pugh, 420 U.S. 103, 43 L.Ed.2d 54 (1975) in stating:

"Maximum protection of individual rights could be assured by requiring a magistrate's review of the factual justification prior to any arrest, but such a requirement would constitute an intolerable handicap for legitimate law enforcement. Thus, while the Court has expressed a preference for the use of arrest warrants when feasible, Beck v Ohio, supra, at 96, 13 L Ed 2d 142; Wong Sun v United States, 371 US 471,

> 479-482, 9 L Ed 2d 441, 83 S Ct 407 (1963), it has never invalidated an arrest supported by probable cause solely because the officers failed to secure a warant." 420 U.S. at 113, 43 L.Ed.2d at 64,65.

In a footnote to that passage, however, the Court distinguished the general question of warrantless arrests from the more specific issue present here of a warrantless arrest in the home and said:

> "The issue of warrantless arrest that has generated the most controversy, and which remains unsettled, is whether and under what circumstances an officer may enter a suspect's home to make a warrantless arrest." Gerstein v. Pugh, supra, 420 U.S. at 113, 43 L.Ed.2d at 65 fn. 13.

In United States v. Watson, 423 U.S. 411, 46 L.Ed.2d 598 (1976) five members of the Court held that a warrantless arrest was permissible, without exception, when the arrest occurred in a public place. The limited scope of the holding in Watson is emphasized by this comment in the majority opinion:

> "6. In the case before us the Court of Appeals relied heavily, but mistakenly, on Coolidge v New Hampshire, 403 US 443, 480-481, 29 L Ed 2d 564, 91 S Ct 2022 (1971), for as we noted in Gerstein v Pugh, 420 US, at 113 n 13, 43 L Ed 2d 54, 95 S Ct 854, the still unsettled question posed in that part of the Coolidge opinion was 'whether and under what circumstances an officer

> may enter a suspect's home to make a warrantless arrest.' Watson's midday public arrest does not present that question." (Emphasis added) 423 U.S. at 418, 46 L.Ed.2d at 605

Although concurring in the majority opinion, Justice Powell took care to comment on what was not included in the decision, saying:

> "[W]e do not today consider or decide whether or under what circumstances an officer lawfully may make a warrantless arrest in a private home or other place where the person has a reasonable expectation of privacy." 423 U.S. at 432, 433, 46 L.Ed.2d at 614.

Justice Stewart noted in a concurring opinion that since the arrest in Watson was made with probable cause "in a public place in broad daylight" the Court did not decide "whether or under what circumstances an officer must obtain a warrant before he may lawfully enter a private place to effect an arrest." 423 U.S. at 433, 46 L.Ed.2d at 614.

Justices Marshall and Brennan dissented and Justice Stevens did not participate.

The most recent pronouncement by the Court on this issue again left open the question whether a warrant is required to make an arrest of a suspect at home in the absence of exigent circumstances. United States v. Santana,

427 U.S. 38, 49 L.Ed.2d 300 (1976). Seven justices joined in the opinion holding that a warrant was not necessary under the facts presented. A narcotics officer had made a buy with marked money from a suspected seller and after the seller was arrested within a few blocks of the home of defendant Santana the officers returned to Santana's dwelling for the purpose of recovering the marked money. They saw Santana standing in the doorway of the house with a brown paper bag in her hand. As they pulled to within 15 feet of her and got out of their van shouting "Police" Santana retreated into the vestibule of her house. The officers followed through the open door, catching her in the vestibule. Police recovered two bundles of heroin that fell from the paper bag and $70 of marked money from Santana's pockets. On Santana's motion the District Court suppressed the evidence finding that a warrant should have been obtained either for Santana's arrest or for a search to recover the marked money. Nevertheless the District Court found that the police acted under extreme emergency conditions. The Court of Appeals affirmed the decision of the District Court but the United States Supreme Court reversed because the arrest had been "set in motion in a public place." 427 U.S. at 43, 49 L.Ed.2d at 306. Again the Court reserved the question of a warrantless arrest of a suspect in his home saying:

> "While it may be true that under the common law of property the threshold of one's dwelling is 'private', as is the yard surrounding the house, it is nonetheless clear that under the cases interpreting the Fourth Amendment Santana was in a 'public' place. She was not in an area where she had any expectation of privacy. 'What a person knowingly exposes to the public, even in his own house or office, is not a subject of Fourth Amendment protection.' Katz v United States, 389 US 347, 351, 19 L Ed 2d 576, 88 S Ct 507 (1967). She was not merely visible to the public but was as exposed to public view, speech, hearing, and touch as if she had been standing completely outside her house. Hester v United States, 265 US 57, 59, 68 L Ed 898, 44 S Ct 445 (1924). Thus, when the police, who concededly had probable cause to do so, sought to arrest her, they merely intended to perform a function which we have approved in Watson." (Emphasis added) 427 U.S. at 42, 49 L.Ed.2d at 305.

Again, however, there were concurring and dissenting opinions, emphasizing the still undecided status of warrantless arrests made in the home. Justice Stewart joined the concurring opinion of Justice Stevens, who pointed out that the arrest was justified because of either exigent circumstances or harmless error. A significant fact was the appearance of Ms. Santana in the doorway of her home, an area not considered within the ambit of reasonable expectation of privacy. United States v. Santana, supra, 427 U.S. at 44,

45, 49 L.Ed.2d at 306 (Stevens, J., concurring).

Justice Brennan joined Justice Marshall's dissent. reiterating the protest to the Court's earlier blanket acceptance of warrantless arrests in public places announced in Watson. United States v. Santana, supra, 427 U.S. at 45-49, 49 L.Ed.2d at 306-309 (Marshall, J., dissenting).

Therefore it appears that the presently constituted Supreme Court has not reached a majority decision on the right of police to make a warrantless arrest of a suspect in his home absent a showing of exigent circumstances. Of the five justices who concurred in the majority opinion in Watson, only Justice White has consistently maintained a position allowing all arrests to be warrantless. Chimel v. California, 395 U.S. 752, 770-783, 23 L.Ed.2d 685, 698-706 (1969) (White, J., dissenting); Coolidge v. New Hampshire, supra, 403 U.S. at 511-512, fn.1,29 L.Ed.2d at 609-610. (White, J., concurring and dissenting). Justices Marshall and Brennan, as noted in dissents registered in Watson and Santana, have consistently taken the contrary position. Justice Stewart has expressed serious doubts about the validity of warrantless arrests in the home, Coolidge v. New Hampshire, supra, 403 U.S. at 480-481, 29 L.Ed.2d at 591 and made clear that the issue was not before the Court

in either Watson or Santana. Justice Stevens maintained a position of announced neutrality on this point in Santana (and took no part in Watson). Justice Powell has likewise taken care to note specifically that the issue was not being decided by Watson. Justices Blackmun, Rehnquist, and the Chief Justice joined the majority opinions in both Watson and Santana, in which the question was reserved, and have not otherwise expressed an opinion.

It seems clear, therefore, that eventually the Court will have to decide if the Warrant Clause applies to arrests in the home. Appellant submits that the trend of decisions leads inexorably to the conclusion that it does, and that the Court will so hold. There are several reasons for this prediction.

First, the Court has taken great care to isolate this issue in its two recent decisions otherwise allowing warrantless arrests. Each time there have been justices concurring specifically to stress the reservation of the question, very likely indicating that had the majority not limited the scope of its holding to public places there might not have been a majority.

Second, just last term all members of the Court joined opinions chastizing the government for taking an extremely narrow view of the Warrant Clause in the context

of a post-arrest search of a footlocker. United States v. Chadwick, _____ U.S. _____, 53 L.Ed.2d 538 (1977); Blackmun. J., (joined by Rehnquish, J.) dissenting, 53 L.Ed.2d at 552; Brennan, J., concurring, Id. at 551.

Third, in slightly different contexts the Court has drawn a sharp distinction between interests which are more deserving of the protection of the Warrant Clause, depending on the degree of the individual's expectation of privacy. Compare, e.g. Katz v. United States, 389 U.S. 347, 19 L.Ed.2d 576 (1967) (warrant required to intercept private telephone conversations made from a telephone booth); United States v. United States District Court, 407 U.S. 297, 32 L.Ed.2d 752 (1972) (warrent required for electronic surveillance of conversations even though the purpose was "national security'); Vale v. Louisiana, 399 U.S. 30, 26 L.Ed.2d 409 (1970) (warrant required for search of home); Coolidge v. New Hampshire, supra, 403 U.S. 443, 29 L.Ed.2d 564 (warrant required to search car on private property); United States v. Chadwick, supra, _____ U.S. _____, 53 L.Ed.2d 538 (warrant required to search double locked footlocker seized at time of valid warrantless arrest); cf. Stanley v. Georgia, 394 U.S. 557, 22 L.Ed.2d 542 (1969) (the state has no power to seize obscene material from the privacy of the home); with, e.g., Carroll v. United States, 267 U.S. 132, 69 L.Ed.2d 543 (1925)

(warrant not required to seize contraband from moving vehicle); Chambers v. Maroney, 399 U.S. 42, 26 L.Ed.2d 419 (1970) (warrant not required to search vehicle at police station after its seizure on the highway, a decision which did not obviate the necessity for a warrant to search the more privately held possession of a footlocker seized under similar circumstances in Chadwick); Cardwell v. Lewis, 417 U.S. 583, 41 L.Ed.2d 325 (1974) (warrant not required to search exterior of car parked on public property).

Based on this analysis and comparison of decisions, a persuasive argument can be made that as the expectation of privacy increases, there is a corresponding increase in the Court's willingness to apply the Warrant Clause by requiring advance judicial permission as an adjunct to probable cause.

Moreover, the explicit language of the Court in prior decisions evinces a strong tendency to protect persons in their homes and other private areas (as opposed to more public places) from direct police intrusion by the insulation of the Warrant Clause.

For example, in Agnello v. United States, 269 U.S. 20, 33, 70 L.Ed. 145 (1925) the Court said:

> "Belief, however well founded, that an article sought is concealed in a dwelling house, furnishes no justification for a search of that place without a warrant. And such searches are held unlawful notwithstanding

facts unquestionably showing probable cause.:

In Cooper v. California, 386 U.S. 58, 59, 17 L.Ed.2d 730, 731 (1967) the Court said:

> "[S]earches of cars that are constantly movable may make the search of a car without a warrant a reasonable one although the result might be the opposite in a search of a home, a store, or other fixed piece of property.:

In United States v. United States District Court, supra, 407 U.S. 297, 32 L.Ed.2d 752, the Court stressed the importance of the Warrant Clause in these terms;

> "Though the FourthAmendment speaks broadly of 'unreasonable searches and seizures,' the definition of 'reasonableness' turns, at least in part, on the more specific commands of the warrant clause. Some have argued that '[t]he relevant test is not whether it is reasonable to procure a search warrant, but whether the search was reasonable,' United States v Rabinowitz, 339 US 56, 66, 94 L Ed 653, 660, 70 S Ct 430 (1950).[16]

16. This view has not been accepted. In Chimel v. California, 395 US 752, 23 L Ed 2d 685, 89 S Ct 2034 (1969), the Court considered the Government's contention that the search be judged on a general 'reasonableness' standard without reference to the warrant clause. The Court concluded that argument was 'founded on little more than a subjective view regarding the acceptability of certain sorts of police conduct, and not on considerations relevant to Fourth Amendment interests. Under such an unconfined analysis, Fourth Amendment protection in this area would approach the evaporation point.' Id., at 764-765, 23 L Ed 2d at 694, 695.

> This view, however, overlooks the second clause of the Amendment. The warrant clause of the Fourth Amendment is not dead language. Rather, it has been 'a valued part of our constitutional law for decades, and it has determined the result in scores and scores of cases in courts all over this country. It is not an inconvenience to be somehow "weighed" against the claims of police efficiency. It is, or should be, an important working part of our machinery of government, operating as a matter of course to check the "well-intentioned but mistakenly overzealous executive officers" who are a part of any system of law enforcement.'" (Emphasis added) Id. at 765.

* * *

> "The Fourth Amendment does not contemplate the executive officers of Government as neutral and disinterested magistrates. Their duty and responsibility is to enforce the laws, to investigate, and to prosecute. Katz v United States, supra, at 359-360, 19 L Ed 2d at 586, 587 (Douglas, J., concurring). But those charged with this investigative and prosecutorial duty should not be the sole judges of when to utilize constitutionally sensitive means in pursuing their tasks. The historical judgment, which the Fourth Amendment accepts, is that unreviewed executive discretion may yield too readily to pressures to obtain incriminating evidence and overlook potential invasions of privacy and protected speech.[17]" (Emphasis added) Id. at 766.

17. H. Lasson, The History and Development of the Fourth Amendment to the United States Constitution 79-105 (1937).

* * *

"It is true that there have been some exceptions to the warrant requirement. Chimel v California, 395 US 752, 23 L Ed 2d 685, 89 S Ct 2034 (1969); Terry v Ohio, 392 US 1, 20 L Ed 2d 889, 88 S Ct 1868 (1968); McDonald v United States, 335 US 451, 93 L Ed 153, 69 S Ct 191 (1948); Carroll v United States, 267 US 132, 69 L Ed 543, 45 S Ct 280, 39 ALR 790 (1925). But those exceptions are few in number and carefully delineated, Katz, supra, at 357, 19 L Ed 2d at 585; in general, they serve the legitimate needs of law enforcement officers to protect their own well-being and preserve evidence from destruction. Even while carving out those exceptions, the Court has reaffirmed the principle that the 'police must, whenever practicable, obtain advance judicial approval of searches and seizures through the warrant procedure,' Terry v Ohio, supra, at 20, 20 L Ed 2d at 905; Chimel v. California, supra, at 762, 23 L Ed 2d at 693." (Emphasis added) Id. at 767.

In Cardwell v. Lewis, supra, 417 U.S. 583, 41 L.Ed.2d 325, the Court again noted the priority of privacy as a key to the warrant requirement, saying:

"Rather than property rights, the primary object of the Fourth Amendment was determined to be the protection of privacy. Id., at 305-306, 65 L Ed 647. And it had been said earlier, 'The decisions of this Court have time and again underscored the essential purpose of the Fourth Amendment to shield the citizen from unwarranted intrusions into his privacy.'" Id. at 334.

* * *

"At least since Carroll v United States, 267 US 132, 69 L Ed 543, 45 S Ct 280, 39 ALR 790 (1925), the Court has recognized a distinction between the warrantless search and seizure of automobiles or other movable vehicles, on the one hand, and the search of a home or office, on the other. Generally, less stringent warrant requirements have been applied to vehicles." Id. at 334.

* * *

"There is still another distinguishing factor. 'The search of an automobile is far less intrusive on the rights protected by the Fourth Amendment than the search of one's person or of a building.' Almeida-Sanchez v United States, 413 US 266, 279, 37 L Ed 2d 596, 93 S Ct 2535 (1973) (Powell, J., concurring). One has a lesser expectation of privacy in a motor vehicle because its function is transportation and it seldom serves as one's residence or as the repository of personal effects." Id. at 335. (Emphasis added).

In South Dakota v. Opperman, 428 U.S. 364, 367, 368, 49 L.Ed.2d 1000, 1004 (1976) the Court said:

"This Court has traditionally drawn a distinction between automobiles and homes or offices in relation to the Fourth Amendment. Although automobiles are 'effects' and thus within the reach of the Fourth Amendment, Cady v Dombrowski, 413 US 433, 439, 37 L Ed 2d 706, 93 S Ct 2523 (1973), warrantless examinations of automobiles have been upheld in circumstances in

> which a search of a home or office would not.
>
> * * *
>
> Besides the element of mobility, less rigorous warrant requirements govern because the expectation of privacy with respect to one's automobile is significantly less than that relating to one's home or office."

Therefore, although the point has not been explicitly decided by the Court, appellant contends that he was protected by the Fourth Amendment from being arrested in his home by police who failed to obtain a warrant or explain why they did not. "Physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed. . . ." United States v. United States District Court, supra, 407 U.S. at 313, 32 L.Ed.2d at 764. The twin concepts stressed in Katz v. United States, supra, 389 U.S. 349, 19 L.Ed.2d 576, that the Amendment protects "people not places" and applies when there is a reasonable expectation of privacy, coalesce to shield appellant from the unilateral action taken by the police here. A more compelling example of abuse could hardly be imagined, when officers, acting only on hearsay from an accomplice, invade a private dwelling, awaken the sleeping appellant with drawn guns and spirit him away for questioning, without bothering first to seek the authority and neutral judgment

of a magistrate. This bypassing of the judiciary when making such a substantial assault on the privacy of a person in his home is intolerable, and surely will be found to violate the right to be free from unreasonable searches and seizures. This case is, on balance, only slightly different from those which have ruled that so-called "exigent circumstances" did not justify warrantless searches and seizures of property. Hornblower v. State, supra; Raffield v. State, (not reported) Fla. S.Ct. case 49,872, July 14, 1977; Parsons v. State, 334 So.2d 308 (Fla. 1 DCA 1976)(cert. discharged October 27, 1977); Shepard v. State, 310 So.2d 127 (Fla. 1 DCA 1975); Hannigan v. State, 307 So.2d 850 (Fla. 1 DCA 1975). There is no meaningful difference between raiding a home without a warrant when the purpose is arresting the occupant as distinguished from conducting a search. Both should require the advance judgment of a neutral magistrate. These words are appropriate, even though written in dissent.

> "We have recognized that 'the Fourth Amendment protects people, not places.' Katz v United States, supra, at 351, 19 L Ed 2d 576, 88 S Ct 507. Indeed, the privacy guaranteed by the Fourth Amendment is quintessentially personal. Cf. Roe v Wade, 410 US 113, 35 L Ed 2d 147, 93 S Ct 705 (1973); Doe v Bolton, 410 US 179, 35 L Ed 2d 201, 93 S Ct 739 (1973); Griswold v Connecticut, 381 US 479, 14 L Ed

2d 510, 85 S Ct 1678 (1965). Thus a warrant is required in search situations not because of some high regard for property, but because of our regard for the individual, and his interest in his possessions and person.

> 'It is not the breaking of his doors, and the rummaging of his drawers, that constitutes the essence of the offense; but it is the invasion of his indefeasible right of personal security, personal liberty and private property, where that right has never been forfeited by his conviction of some public offense, - it is the invasion of this sacred right which underlies and constitutes the essence of Lord Camden's judgment [in the classic English warrant case of Entick v Carrington, 19 How St Tr 1029, 95 Eng Rep 807 (1765)].' Boyd v United States, 116 US 616, 630, 29 L Ed 746, 6 S Ct 524 (1886).

Not only is the Fourth Amendment directly addressed to the privacy of our citizens, but it speaks in indistinguishable terms about the freedom of both persons and property from unreasonable seizures. A warrant is required in the search situation to protect the privacy of the individual, but there can be no less invasion of privacy when the individual himself, rather than his property, is searched and seized. Indeed, an unjustified arrest that forces the individual temporarily to forfeit his right to control his person and movements and

> interrupts the course of his daily business may be more intrusive than an unjustified search.
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> A warrant requirement for arrests would, of course, minimize the possibility that such an intrusion into the individual's sacred sphere of personal privacy would occur on less than probable cause. Primarily for this reason, a warrant is required for searches. Surely there is no reason to place greater trust in the partisan assessment of a police officer that there is probable cause for an arrest than in his determination that probable cause exists for a search." 423 U.S. at 445-447, 46 L. Ed.2d at 622, 623 (Marshall, J., dissenting).

To underscore the need for a warrant here, it is significant that after the arrest the police first brought the appellant to the Sheriff's Office for questioning, rather than bringing him directly to a magistrate for the determination of probable cause and the advisement of rights. This action undercuts the assumption made in Chimel v. California, supra, 395 U.S. 752, 23 L.Ed.2d 685, by Justice White in arguing that warrants were unnecessary when he said that a warrantless arrest "demands the prompt bringing of the person arrested before a judicial officer, where the existence of probable cause is to be inquired into" and that the arrested person would be provided "almost immediately with a lawyer and a

judge". Id. at 782, 783, 23 L.Ed.2d at 705, 706.

Furthermore, the absence of prior judicial approval for the arrest here casts serious doubt on whether the police really had probable cause. The only evidence against appellant at trial was his own confession. The supposed "informer" took the Fifth Amendment at trial.

Under these circumstances it is virtually impossible to assess after the fact the actual information, and the indicia of its reliability, known by the police prior to appellant's arrest and confession. The floundering testimony of Officer Terry in explaining the facts known by he and other officers highlights the need for judicial determination of probable cause before, and not after, the arrest. In Beck v. Ohio, 379 U.S. 89, 96, 13 L.Ed.2d 142, 147 (1964) the Court commented on this same point, saying:

> "An arrest without a warrant bypasses the safeguards provided by an objective predetermination of probable cause, and substitutes instead the far less reliable procedure of an after-the-event justification for the arrest or search, too likely to be subtly influenced by the familiar shortcomings of hindsight judgment."

Because the police in the case now before the Court failed to obtain prior judicial approval before arresting appellant in his home, when there was no showing of an excuse

for not obtaining an arrest warrant, the arrest was invalid under either the Federal and Florida Constitutions, or under both. The appellant's confession was the direct result of this unconstitutional arrest and should have been suppressed.